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**H.R. 994, REGULATORY SUNSET AND REVIEW
ACT OF 1995**

Y 4.G 74/7:R 26/6

H.R. 994, Regulatory Sunset and Rev...

HEARINGS

BEFORE THE

SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH,
NATURAL RESOURCES, AND REGULATORY AFFAIRS
OF THE

**COMMITTEE ON GOVERNMENT
REFORM AND OVERSIGHT
HOUSE OF REPRESENTATIVES**

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

ON

H.R. 994

**TO REQUIRE THE PERIODIC REVIEW AND AUTOMATIC TERMINATION
OF FEDERAL REGULATIONS**

MARCH 28 AND MAY 2, 1995

Printed for the use of the Committee on Government Reform and Oversight



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H.R. 994, REGULATORY SUNSET AND REVIEW ACT OF 1995

TUESDAY, MARCH 28, 1995

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH,
NATURAL RESOURCES, AND REGULATORY AFFAIRS,
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:15 a.m. in room 2247, Rayburn House Office Building, Hon. David McIntosh (chairman of the subcommittee) presiding.

Present: Representatives Condit, Ehrlich, Gutknecht, McIntosh, Peterson, Scarborough, Shadegg, Slaughter, and Waxman.

Staff present: Mildred Webber, staff director; Jon Praed, chief counsel; Todd Gaziano, senior counsel; Karen Barnes, professional staff member; and David White, clerk.

Mr. MCINTOSH. The Subcommittee on Economic Growth, Natural Resources, and Regulatory Affairs is convened into order. I am pleased to open the subcommittee's hearing on the Regulatory Sunset and Review Act of 1995. This bipartisan piece of legislation was introduced by Congressmen Chapman, Mica and DeLay to address the issue of obsolete, inconsistent and duplicative regulations. Such regulations are to blame for much of the burden and expense of the Federal regulatory system, a total of \$600 billion per year.

Many of the regulations which cost jobs, raise prices and impose a hidden tax on the American people are today obsolete. These regulations have been enforced for years without being reviewed. They must be examined to determine if they are fulfilling their intended purpose; if their benefits outweigh their costs; or if there is a need for them now, under the current situation.

It is time for this web of Federal regulations to see the light of day. And if any single regulation cannot be shown to be beneficial and necessary, then it should be eliminated. Many Federal regulations contradict and duplicate each other. A joint economic committee cites the example of an OSHA regulation that requires respirators or masks worn by certain workers to fit tightly around the mouth, making it very difficult for employees with beards to wear these devices.

An EEOC requirement, on the other hand, prohibits discrimination assignments against people who are not clean-shaven. In this case, the long arm of the Government has reached so far in overlapping and contradicting itself to say, well, in one case, you can have a beard; in another, you can't perform the job because you won't be able to wear the required device.

The Regulatory Sunset and Review Act would relieve the American public of at least part of the \$600 billion per year in the cost of regulations. Under this bill, all existing Federal regulations would be reviewed every 7 years; new regulations would be reviewed after 3 years; and the agencies would be required to take a look at the regulation to see whether it met a cost benefit test, whether it had outlived its usefulness, and a series of other criteria.

I think the Regulatory Sunset and Review Act marks a significant departure from previous attempts to reduce the number of obsolete and duplicative and conflicting regulations. Historically, regulations have been reviewed on a piecemeal basis. Both President Bush and President Clinton have instituted agency-wide review. But they are limited under that process to what they can take as administrative steps.

This bill would employ a broad brush approach, empowering the agencies to focus on retaining only those regulations which truly protect and serve individual citizens and our Nation's business. Such a broad approach is necessary to bring common sense back to our regulatory system. And this return to common sense in regulations is what the American people are demanding, and should be a key mission of this 104th Congress.

[The text of H.R. 994 follows:]

H.R. 994

To require the periodic review and automatic termination of Federal regulations.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 21, 1995

Mr. CHAPMAN (for himself, Mr. MICA, Mr. DELAY, Mr. DEAL of Georgia, and Mr. PETE GEREN of Texas) introduced the following bill; which was referred to the Committee on Government Reform and Oversight and, in addition, to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To require the periodic review and automatic termination of Federal regulations.
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Regulatory Sunset and Review Act of 1995".

SEC. 2. PURPOSE.

The purposes of this Act are the following:

- (1) To require agencies to regularly review their regulations and make recommendations to terminate, continue in effect, modify, or consolidate those regulations.
- (2) To require agencies to submit those recommendations to the Administrator of the Office of Information and Regulatory Affairs and to the Congress.
- (3) To provide for the automatic termination of regulations that are not continued in effect after such review.
- (4) To designate a Regulatory Review Officer within each agency, who is responsible for the implementation of this Act by the agency.

SEC. 3. REVIEW AND TERMINATION OF REGULATIONS.

(a) IN GENERAL.—Except as provided in subsection (c), the effectiveness of a regulation issued by an agency shall terminate on the applicable termination date under subsection (b), and the regulation shall have no force or effect after that termination date, unless the head of the agency—

(1) reviews the regulation in accordance with section 4;

(2) after the review, and at least 120 days before that termination date, submits to the Congress and publishes in the Federal Register a preliminary report on the findings and proposed recommendations of that review in accordance with section 5(a)(1);

(3) reviews and considers comments regarding the preliminary report that are transmitted to the agency by the Administrator and appropriate committees of the Congress during the 60-day period beginning on the date of submission of the preliminary report; and

(4) after the 60-day period beginning on the date of submission of the preliminary report to the Congress, but not later than 60 days before that termination date, submits to the Congress and publishes in the Federal Register—

(A) a final report on the review under section 4 in accordance with section 5(a)(2), and

(B) a notice extending the effectiveness of the regulation, with or without modifications, as of the end of the 60-day period beginning on the date of that publication.

(b) TERMINATION DATES.—For purposes of subsection (a), the termination date of a regulation is as follows:

(1) EXISTING REGULATIONS.—For a regulation in effect on the date of the enactment of the Act, the termination date is the last day of the 7-year period beginning on the date of the enactment of this Act.

(2) NEW REGULATIONS.—For a regulation that first takes effect after the date of the enactment of this Act, the termination date is the last day of the 3-year period beginning on the date the regulation takes effect.

(3) REGULATIONS CONTINUED IN EFFECT.—For a regulation the effectiveness of which is extended under subsection (a), the termination date is the last day of the 7-year period beginning on the date of publication of a notice under subsection (a)(4) for that extension.

(c) TEMPORARY EXTENSION.—The termination date under subsection (b) for a regulation may be delayed by not more than 6 months by the head of the agency that issued the regulation if the agency head submits to the Congress and publishes in the Federal Register a preliminary report that describes modifications that should be made to the regulation.

(d) RELATIONSHIP TO OTHER LAW.—Section 553 of title 5, United States Code, shall not apply to the extension or modification of a regulation in accordance with this Act.

SEC. 4. REVIEW OF REGULATIONS BY AGENCY.

(a) IN GENERAL.—The head of each agency shall, under the criteria set forth in subsection (b)—

(1) conduct thorough and systematic reviews of all regulations issued by the agency to determine if those regulations are obsolete, inconsistent, or duplicative or impede competition; and

(2) issue reports on the findings of those reviews, which contain recommendations for—

(A) terminating or extending the effectiveness of those regulations;

(B) any appropriate modifications to a regulation recommended to be extended; or

(C) any appropriate consolidations of regulations.

(b) CRITERIA FOR REVIEW.—The head of an agency shall review, make recommendations, and terminate or extend the effectiveness of a regulation under this section under the following criteria:

(1) The extent to which the regulation is outdated, obsolete, or unnecessary.

(2) The extent to which the regulation or information required to comply with the regulation duplicates, conflicts with, or overlaps requirements under regulations of other agencies.

(3) The extent to which the regulation impedes competition.

(4) Whether the benefits to society from the regulation exceed the costs to society from the regulation.

(5) Whether the regulation is based on adequate and correct information.

(6) Whether the regulation is worded as simply and clearly as possible.

(7) Whether the most cost-efficient alternative was chosen in the regulation to achieve the objective of the regulation.

(8) The extent to which information requirements under the regulation can be reduced, particularly for small businesses.

(9) Whether the regulation is fashioned to maximize net benefits to society.

(10) Whether the regulation is clear and certain regarding who is required to comply with the regulation.

(11) Whether the regulation maximizes the utility of market mechanisms to the extent feasible.

(12) Whether the condition of the economy and of regulated industries is considered.

(13) Whether the regulation imposes on the private sector the minimum economic burdens necessary to achieve the purposes of the regulation.

(14) Whether the total effect of the regulation across agencies has been examined.

(15) Whether the regulation is crafted to minimize needless litigation.

(16) Whether the regulation is necessary to protect the health and safety of the public.

(17) Whether the regulation has resulted in unintended consequences.

(18) Whether performance standards or other alternatives were utilized to provide adequate flexibility to the regulated industries.

(c) REQUIREMENT TO SOLICIT COMMENTS FROM THE PUBLIC AND PRIVATE SECTOR.—In reviewing regulations under this section, the head of an agency shall solicit comments from the public (including the private sector) regarding the application of the criteria set forth in subsection (b) to the regulation before making determinations under this section and sending a report under section 5(a) regarding a regulation. **172SEC. 5. AGENCY REPORTS.**

(a) PRELIMINARY AND FINAL REPORTS ON REVIEWS OF REGULATIONS.—The head of an agency shall submit to the President, the Administrator, and the Congress and publish in the Federal Register for each review of a regulation under section 4—

(1) a preliminary report that contains—

(A) specific findings of the agency regarding—

(i) application of the criteria set forth in section 4(b) to the regulation;

(ii) the need for the function of the regulation; and

(iii) whether the regulation duplicates functions of another regulation; and

(B) proposed recommendations on whether—

(i) the effectiveness of the regulation should terminate or be extended;

(ii) the regulation should be modified; and

(iii) the regulation should be consolidated with another regulation; and

(2) a final report on the findings and recommendations of the agency head regarding extension of the effectiveness of the regulation and any appropriate modifications to the regulation that includes—

(A) a full justification of the decision to extend and, if applicable, modify the regulation; and

(B) the factual basis for all determinations made with respect to that extension or modification under the criteria set forth in section 4(b).

(b) REPORT ON SCHEDULE FOR REVIEWING EXISTING REGULATIONS.—Not later than 100 days after the date of the enactment of this Act, and annually thereafter, the head of each agency shall submit to the Administrator and the Congress and publish in the Federal Register a report stating a schedule for reviewing in accordance with this Act regulations issued by the agency before the date of that submission. The first schedule shall give priority to reviewing during the 3-year period beginning on the date of the enactment of this Act regulations that have an annual effect on the economy of \$100,000,000 or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

SEC. 6. FUNCTIONS OF ADMINISTRATOR.

(a) IN GENERAL.—The Administrator shall—

(1) review and evaluate each report submitted by the head of an agency under section 5(a), regarding—

(A) the quality of the analysis in the reports;

(B) whether the agency has properly applied the criteria set forth in section 4(b); and

(C) the consistency of the agency action with actions of other agencies; and

(2) transmit to the head of the agency the recommendations of the Administrator regarding the report.

(b) GUIDANCE.—The Administrator shall provide guidance to agencies on the conduct of reviews and the preparation of reports under this Act.

SEC. 7. DESIGNATION OF AGENCY REGULATORY REVIEW OFFICERS.

(a) IN GENERAL.—The head of each agency shall designate an officer of the agency as the Regulatory Review Officer of the agency.

(b) FUNCTIONS.—The Regulatory Review Officer of an agency shall—

(1) be responsible for the implementation of this Act by the agency; and

(2) report directly to the head of the agency with respect to that responsibility.

SEC. 8. JUDICIAL REVIEW.

Notwithstanding any other provisions of law, an action seeking judicial review of an agency action under this Act extending, terminating, modifying, or consolidating a regulation may not be brought after the 30-day period beginning on the date of the publication of a notice under section 3(a)(4) for that action.

SEC. 9. REQUIREMENT TO PROVIDE CONGRESS NOTICE AND OPPORTUNITY TO COMMENT BEFORE MODIFYING, EXTENDING, OR TERMINATING REGULATION.

An agency may not modify a regulation or terminate or extend the effective period of a regulation, unless the head of the agency—

(1) submits to the Congress—

(A) notice of the proposal to take that action, at least 120 days before the effective date of that action; and

(B) notice of the final determination to take that action, at least—

(i) 60 days after submitting notice under subparagraph (A) for the action; and

(ii) 60 days before the effective date of the action; and

(2) reviews and considers comments submitted to the agency by appropriate committees of the Congress during the 60-day period beginning on the date of submittal of notice under paragraph (1)(A) for the action.

SEC. 10. DEFINITIONS.

In this Act:

(1) ADMINISTRATOR.—The term “Administrator” means the Administrator of the Office.

(2) AGENCY.—The term “agency” has the meaning given that term in section 551(1) of title 5, United States Code.

(3) APPROPRIATE COMMITTEE OF THE CONGRESS.—The term “appropriate committee of the Congress” means with respect to a regulation each standing committee of the Congress having authority under the rules of the House of Representatives or the Senate to report a bill to enact or amend the provision of law under which the regulation is issued.

(4) OFFICE.—The term “Office” means the Office of Information and Regulatory Affairs in the Office of Management and Budget.

(5) REGULATION.—The term “regulation” means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy, other than such a statement to carry out a routine administrative function of an agency.

Mr. MCINTOSH. I'd like to ask if any of my colleagues, Mr. Peterson or Mr. Condit, would like to have an opening statement.

Mr. PETERSON. Mr. Chairman, just briefly, I want to commend you for your leadership in trying to bring these regulations under control. And I want to commend my colleagues, Mr. Chapman and Mr. Mica, for bringing this idea before the subcommittee. I think it's another approach that we ought to take a look at that, I think, makes some sense. And hopefully, we can incorporate something like this idea into the overall regulatory reform effort that's continuing to take place over in the Senate.

And maybe this is something we can incorporate into the overall, final product. Every day, it seems like, I get another call with another horror story from my district about some regulatory situation

that's run amuck. In fact, the reason I was late getting down here, I was just listening to another one of my small businesspeople who has run amuck with one of the Federal agencies that I'm going to talk to you about, Mr. Chairman.

So I, again, want to commend my colleagues. I look forward to hearing about this piece of legislation today. And hopefully, when we get all done with this, we can bring some sensibility to some of this regulatory morass that we're in. Thank you.

Mr. MCINTOSH. Thank you very much, Mr. Peterson. Mr. Condit.

Mr. CONDIT. Mr. Chairman, I'll be brief. I have a statement I'd like to submit to the record. But I'd just briefly say, I would like to commend and congratulate you in your leadership in this issue of regulatory reform. I also would like to commend Mr. Chapman and Mr. Mica, who both have been leaders in this area, and just say we appreciate what they're doing.

If we're going to ever regain the confidence of the American people in regulation, in us passing legislation that the intent is to protect the American people, we're going to have to do exactly what these gentlemen are suggesting. And that is, from time to time, we need to revisit regulations to make sure it has not got out of whack; that it has not become crazy and funny on us. And revisiting the issue, sunseting it, I think, is an important part of regulatory reform.

We do this in California. We've had sunset laws in California for a number of years. What we need to do is make sure that when we pass a sunset law, that we actually use it; that we come back and revisit the issue and make sure that the regulation that we passed has some objective, and that there is common sense applied to that regulation. So I just think this is very important.

I think it is one of the most important issues facing this Congress this session. And I commend all the people involved, because this is truly needed. And Mr. Chairman, I appreciate your efforts. Thank you, and I'd like to submit a lengthy statement for the record, if I may.

Mr. MCINTOSH. Certainly. Thank you very much, Mr. Condit. Mr. Scarborough, would you have any opening remarks?

Mr. SCARBOROUGH. Sure. I, too, Mr. Chairman, want to commend you for your work on regulatory review. And I think it's a very, very important measure that we're taking up today. I can't tell you how many times I've heard, back in my district, my constituents expressing the same concerns I'm sure all of you have heard. And that is, that we seem to be a country now that is ruled by regulation instead of law, and seem to be a country that is ruled by regulatory agencies instead of our duly elected representatives.

I think this is an extremely important step to push back that tide, move in the direction that we need to move in. And what my constituents want, and I'm sure what all of our constituents want, is to move in that direction. I commend all of you for your work on it, and I'm looking forward to taking part in the discussion.

Mr. MCINTOSH. Thank you very much, Mr. Scarborough. I'm privileged and honored to have before us today the original cosponsors of this legislation, and would now like to invite both of them to testify on the bill. Mr. Chapman from Texas, could you elaborate on the purposes and benefits of your legislation?

STATEMENTS OF HON. JIM CHAPMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS; AND HON. JOHN MICA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. CHAPMAN. Mr. Chairman, I first want to thank you for your leadership not just since you have arrived in Congress, but your leadership before on matters that are critical to keeping our country strong, competitive, and, I think, the leadership you have provided in this particular issue area. Seated before me, I will say quite honestly, are four Members of the House who have been at the forefront of these issues.

On my side of the aisle, both Mr. Peterson and Mr. Condit have been critical leaders in regulatory review, regulatory reform, and bringing some common sense, I think, to the way Government operates. I appreciate the opportunity to be here, particularly it is a pleasure to be with the original coauthor of this legislation, my colleague from Florida, Mr. Mica. And I have a statement, Mr. Chairman, with your permission, I will submit for the record. But I will summarize that and then perhaps save time for any questions that either you or the members of the subcommittee may have.

Mr. Chairman, you mentioned in your opening statement some of the facts that have brought about, I think, a lack of confidence of the American people in the ability of the Congress and the Federal Government to be responsive to those concerns—legitimate concerns, in my judgment—that have, over a period of years, caused the regulatory agencies of the Federal Government to become not only intrusive, but have become so burdensome to free enterprise, to initiative, to doing those things that have made this country great, quite honestly, in the stifling of free enterprise, competition, and hindering the ability and the genius of our American system to function.

Now, while all of us, I know, share a belief that we ought to have clean water and clean air. All of us believe in a safe workplace. All of us believe that there is an appropriate role, at the Federal level, to do those things that make sense. What we have had, particularly in the last decade or so, is an absolute explosion of Federal regulations. Such now that I understand that since—well, in 1935, there were 4,000 pages of regulations listed in the Federal Register.

That number is now 65,000 pages of Federal regulations that are listed. If the trend continues, by 1995, the number of pages in the Federal Register will hit an all-time high of 90,000 pages of rules and regulations we ask Americans to live under. If you stacked a copy of each of the Federal Registers from just the past 12 years on top of each other, you'd build a tower higher than the Washington Monument.

We've got to do something to stop that explosion of regulation. And while H.R. 9, Mr. Chairman, is an extremely good start, it's prospective. H.R. 9 is regulatory reform that will apply to regulations in the future. We have yet, in the House, to address the issue of Government regulations that are currently in the books, that have been on the books, that seem to have been carved in stone on the books that are counterproductive, anticompetitive, and in so many ways, have created the kinds of mischief that you're going to

hear about today from some of the witnesses that will testify before this committee.

That's what our legislation is designed to do—to bring what I think is much needed review to existing regulations. Since 1978, every single President of both parties—every single President—has attempted, by Executive order, to do something about overburdensome regulation. In fact, I can recall clearly in 1991, when President Bush stood in his State of the Union address, in the well of the House of Representatives, and declared a moratorium on new Government regulation.

He said that moratorium would last for the next 90 days, and to a rousing, standing ovation from both sides of the aisle, America cheered. Mr. Chairman, that moratorium lasted less than 72 hours. That's how much attention the agencies paid to the President of the United States. We've got to have something. Every President has attempted to deal with this, including President Clinton.

There is currently, and I think the testimony later this morning will reveal, there is currently, in this administration, another attempt and another effort to do something about overburdensome Government regulations. None of it has worked. So what do we do? What the Chapman-Mica approach says is, we will force that review, or that regulation simply goes away; it sunsets.

And there are 18 commonsense criteria that are in this legislation by which every existing Federal regulation will be judged on a periodic basis, as you will see in the bill. New regulations get a look-see 3 years down the road after they've been effective. And all existing regulations must be reviewed within a 7-year window, and each 7 years thereafter.

Mr. Chairman, I believe that this approach, by forcing agencies to go back and look at what they have done, what the regulations are, is just good common sense that will help ease the burden of regulations. If they're good, they'll continue. If they need fine-tuning, they can be. If they should be abolished, perhaps, finally, there will be an opportunity to abolish them.

I think it is commonsense legislation that I hope, with your leadership and the leadership of your subcommittee, we can move through the House of Representatives in time to make an impact and perhaps be incorporated in the final regulatory relief legislation that we all, I think, will spill out of the legislative pipeline and land on the President's desk later this year.

That's our goal. And I think working together with this legislation and with your leadership, we can finally put in place a mechanism by which we can finally bring some common sense to the existing regulatory scheme by forcing some review. Mr. Chairman, I appreciate the opportunity to be here this morning, and I look forward to any questions you may have.

[The prepared statement of Hon. Jim Chapman follows:]

STATEMENT BY CONGRESSMAN JIM CHAPMAN
ON H.R. 994
SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH, NATURAL RESOURCES
AND REGULATORY AFFAIRS
MARCH 28, 1995

Good morning, Mr. Chairman and Members of the Committee. It is a great pleasure for me to appear before you today to discuss legislation that I have introduced along with my colleague, Representative John Mica, entitled the Regulatory Sunset and Review Act, H.R. 994. I believe that this bipartisan legislation is an important addition to the omnibus regulatory reform package, H.R. 9, that was adopted by the House earlier this month.

While H.R. 9 will go far toward improving future regulations, the problem we face today is with existing regulations which are not based on good science, are not cost-effective or just simply no longer make sense. Our legislation seeks to address this problem through a sensible strategy of periodic regulatory reviews and a sunset date by which these reviews must be complete.

As this Subcommittee is well aware, America has experienced a dramatic increase in government regulations. The annual cost of federal regulations in this country is more than \$500 billion -- \$5,000 per household -- and is projected to rise to \$662 billion by the year 2000. Almost 75 percent of this increase is expected to come from additional environmental, health and safety regulations.

According to EPA's own projections, by the year 2000, the U.S. will spend \$160 billion annually on pollution control alone -- almost 90 percent more than was spent in 1987.

It is interesting to note that in 1935 there were 4,000 pages of regulations listed in the Federal Register. Today, there are 65,000 pages of such regulations. If this trend continues, by 1995, the number of pages in the Federal Register will hit an all time high of 90,000.

To illustrate this point, if you stacked a copy of each of the Federal Registers from the past 12 years on top of each other, you could build a tower that would rise to the height of the Washington Monument.

While the direct cost of federal regulations usually impact businesses and state and local governments, they ultimately impact the American consumer through higher priced products and services, lower wages, reduced quality or availability of products and services as well as increased taxes.

It is my view that the goal behind most federal regulations is laudable and that there are many regulations on the books that provide legitimate environmental, health and safety protections to the American public. This legislation does not seek to undercut such protections. What it does attempt to do is to require agencies to periodically take stock of their regulations in light of changing circumstances and improvements in technologies to make sure that they are still necessary and that they are being carried out in the most cost-effective manner available to achieve the desired results.

HISTORY OF EXECUTIVE BRANCH REGULATORY REFORM EFFORTS:

Since at least 1978, each Administration has sought to reduce the cost of federal regulations by terminating or modifying existing regulations that were found to be unnecessary, overly burdensome or duplicative.

In 1978, President Jimmy Carter ordered executive agencies to review their existing regulations and make a determination to either abolish, revise or modify them. He was also responsible for signing into law the Paperwork Reduction Act, creating the Office of Information and Regulatory Affairs (OIRA).

In 1981, President Ronald Reagan issued his own directive to executive agencies incorporating and strengthening many of the elements of President Carter's order. He established a Presidential Task Force on Regulatory Review to evaluate new and existing regulations. Its mission was to ensure that new regulations were the least burdensome and to determine which existing regulations could be abolished or made less costly.

In 1989, President George Bush created his own organization to oversee federal regulations, the Council on Competitiveness -- with which Chairman McIntosh, who served as the Director of this Council, is very familiar.

Under President Bill Clinton, this trend towards regulatory reform has continued. President Clinton established the Vice-President's National Performance Review in which Vice President Gore stated "we must clear the thicket of regulations by undertaking a thorough review of the regulations already in place and redesigning regulatory processes to end the proliferation of unnecessary and unproductive rules."

Most recently, President Clinton issued a directive requiring every agency head to examine the regulations they administer to see what has become obsolete and can be discarded.

However, even given all this activity at the executive branch, burdensome and unnecessary federal regulations continue to live on and a formal regulatory review process has not been

put into place. Our legislation would establish a sound regulatory management structure through which agencies would be required to review existing regulations every 7 years.

THE REGULATORY SUNSET & REVIEW ACT, H.R. 994:

Let me briefly outline for the Committee H.R. 994 and how we envision it being carried out.

- All federal regulations would undergo a review by the appropriate agency to determine whether they are still necessary. There are 18 criteria in the bill which the agency would use to carry out this review -- including whether the benefits of the regulation outweigh the costs and whether the regulation has become obsolete or overburdensome. The agency would make recommendations to modify, terminate, consolidate or extend the effectiveness of a regulation.
- The force behind this legislation is a sunset requirement which states that unless the agency reviews the regulation and makes its recommendations as to the future of the regulation before the time period set forth in the bill [7 years for existing regulations and 3 years for new regulations] it would terminate or sunset.
- Both the Office of Information and Regulatory Affairs (OIRA) at OMB and the relevant authorizing Committees in the Congress will have 60 days with which to submit comments on the agency's preliminary recommendation to modify, terminate, consolidate or extend the effectiveness of a regulation.
- Once OIRA and Congressional feedback have been reviewed, a final determination is made by the agency. The Congress has 60 additional days to disapprove of the agency's recommendations through normal legislative procedures.

This process forces agencies to justify the existence of regulations that are currently on the books and it allows them to systematically consolidate, eliminate or modify regulations which are no longer necessary. It also provides for Congressional input into the regulatory review process.

CRITERIA FOR REVIEW UNDER H.R. 994:

There are 18 different criteria in this bill that the agency is asked to consider in its review. I would like to briefly touch on a few of these common sense criteria.

Agencies would be asked to determine whether or not the most cost-efficient alternative was chosen to achieve the objective of the regulation; whether the regulation maximizes the utility of market mechanisms; and whether performance standards were utilized to provide adequate flexibility to the regulated industries.

One problem with government regulation is the fact that command-and-control solutions are often not the most cost-effective. When federal agencies allow business to determine the most optimal compliance strategy, agencies often find that more protection of human health and the environment occurs for less expenditures.

- The EPA study at the Amoco Yorktown Refinery proved this conclusion. This joint EPA/industry pollution prevention study allowed Amoco to choose innovative approaches to achieve emission reductions in place of the regulations EPA might otherwise have required. The study resulted in emission reductions of 90% that were achieved for about 20-25% of what they otherwise would have cost under EPA's prescriptive or command and control regulations.
- The acid rain program in the Clean Air Act Amendments of 1990 is an example of successfully utilizing market mechanisms. This program implemented tradable credits for sulphur dioxide (SO₂) which can be purchased on the open market. It was originally anticipated that the cost of the SO₂ reduction program would be \$1500 per ton of SO₂ removed; however, through market trading, significant innovations have emerged and the cost has fallen to \$150 per ton -- saving consumers billions. In addition, the clean-up is 40% ahead of schedule.

The extent to which information requirements under the regulation can be reduced, particularly for small businesses.

American business is swimming in paperwork. Small businesses in particular do not have the manpower or other resources to comply with needless paper burdens. Government agencies often have only paid lip service to the requirements of the Paperwork Reduction Act. It is estimated that the public spends more than 6 billion hours a year complying with federal information requests.

- The Occupational Health and Safety Administration (OSHA) created the Hazard Communication Standard in 1987. The intent of the standard was to provide a way for employees to understand the hazards of materials they deal with in the workplace. The standard requires employers to keep records in the form of Material Safety Data Sheets or MSDS, on all

potentially hazardous materials with which employees may come into contact at work. While all this sounds fine, it has come to be abused.

For example, as cited in U.S. News and World Report, in 1991 OSHA's regulatory office in Chicago issued a citation to a brick maker for failing to supply a MSDS with each pallet of bricks. While bricks can fall on people, they had never been considered poisonous. OSHA reasoned that a brick could be poisonous because when sawed it could release a small amount of the mineral silica. The fact that this doesn't happen much at construction sites was of no consequence. Brick makers fearing lawsuits began sending the form along with each pallet of bricks so that workers would know how to identify a brick [a "hard ceramic body with no odor"] and giving its boiling point ("above 3,500 degrees fahrenheit"). In 1994, after three years of litigation, OSHA finally backed down and removed the poison designation for bricks.

The extent to which the regulation or information required to comply with the regulation duplicates, conflicts with, or overlaps requirements under regulations of other covered federal agencies.

Federal regulations are often a conflicting morass of burdens. Sometimes, compliance with one regulation may cause the violation of another regulation. For instance, when EPA requires reductions in water pollution, the regulated facility may be forced to burn the residues, thus infringing upon Clean Air regulations.

- According to a study conducted by the Joint Economic Committee (JEC), the requirements of OSHA and the Equal Employment Opportunity Commission (EEOC) often conflict with one another. For example, OSHA requires certain workers to wear respirators or masks that are fit tightly around the mouth -- a requirement making it difficult for employees with beards to wear these devices. EEOC requirements, however, prohibit discrimination in job assignments and prevent a company from requiring employees to be clean-shaven.

Agencies would be asked to determine whether or not the regulation has had unintended consequences.

- The 5th Circuit Court of Appeals actually overruled an EPA regulation banning the use of asbestos in car brake linings on the grounds that not using asbestos could lead to a significant increase in traffic fatalities due to brake failures. Ironically, the court relied on an EPA generated study in coming to this conclusion.

The extent to which the regulation is outdated, obsolete, or unnecessary.

Many federal regulations that are clearly obsolete nevertheless remain in the Code of Federal Regulations.

- The Department of Transportation did not remove the last rules governing the Civil Aeronautics Board -- which ceased to exist in 1984 -- until 1992.

While some of these regulations are innocuous, others may have effects that are unintentionally harmful.

Whether the regulation is fashioned to maximize net benefits to society.

In a world of limited financial resources, costs and benefits must be balanced in order to allocate regulatory costs in a manner that maximizes protection of human health and the environment. We can achieve as good or better protection of human health and the environment at far less cost by simply regulating smarter. According to researchers at the Heritage Foundation:

- It would cost \$119 billion to avert one death under the formaldehyde occupational exposure limit. With that much money, we could develop and bring to market 330 potential life-saving new drugs.
- It would cost \$4.2 billion to save one life under the hazardous waste disposal ban. With this money, 47,000 criminals could be kept in prison for three and a half years.

CONCLUSION:

Is it unreasonable to ask a federal agency to review its existing regulations to determine whether they are achieving the stated objectives? Whether the added cost to the nation is worth the benefits being produced? Whether the most efficient means to achieve the stated objective are being used? No, it is not unreasonable to ask federal agencies to conduct this type of review.

The framework put forth in H.R. 994 will produce smarter regulations. It will ensure that regulations that are not based on good science, are not cost-effective and simply no longer make sense are either consolidated, modified or discarded.

The cumulative impact of regulations cannot be addressed without this type of comprehensive regulatory reform. I urge the Committee to support this legislation. Thank you, Mr. Chairman and Members of the Committee.

Mr. MCINTOSH. Thank you very much, Mr. Chapman. Mr. Mica, from Florida.

Mr. MICA. Mr. Chairman, I want to thank you for the opportunity to testify on our legislation today. Thank you for your leadership in the area of regulatory reform. Also, I want to thank the ranking member, Mr. Peterson, for his leadership. I know he's been working closely with my staff; and I appreciate that. Mr. Condit and the other members of the panel, this, in fact, is a bipartisan effort.

And I did want to say that the 104th Congress and the new majority and leaders on both sides of the aisle have been engaged in really a process of trying to make some common sense both out of the quantity and quality of Federal rules being churned out by our Federal agencies. The House, to date, has passed legislation to place a temporary moratorium on Federal regulations providing legislative guidelines for the use of risk assessment and cost benefit analysis and incorporating flexibility into the regulatory process.

These are significant regulatory reform milestones. But unfortunately, they are mostly prospective in nature. These bills, and our congressional action to date, do little to address the incredible, sometimes insurmountable, and often unintelligible volume of rules, regulations and edicts adopted by countless bureaucrats over the years. I submit that this Nation, our business, industry, agriculture, in fact, any productive activity where our average citizen are now drowning in this regulatory morass we've created.

In the past few decades, the volume of Federal regulations have grown to exceed 1 million pages. You heard my colleague talk about the annual increase in the volume of pages. With over 4,300 regulations currently pending, I would venture to say—and I'd also venture that attorneys and CPA's would confirm—that because of the sheer volume, regulatory compliance today has become an elusive challenge, if not an impossible task.

Furthermore, I submit that more than taxation or litigation, over-regulation has become the No. 1 job killer in the United States, and sent more American jobs overseas than any other Federal penalty that we impose. That is why I've joined my distinguished colleague, Mr. Chapman, in the introduction of this legislation to require a review and periodic sunset of Federal regulations.

It is critical that from time to time, and in an orderly fashion, we review, revise and discard regulations. We live in rapidly changing times. In fact, technology and communications now outpace regulations. Both this administration, the Clinton administration, and my State of Florida—our Governor—and in other political units throughout the country, we see a call today for review of existing regulations.

To ignore the need to periodically review regulations, update rules and establish reasonable and contemporary standards, we will further damage business, industry, and our ability to compete in a very tough world market. In closing, I submit to you, if there should be a periodic review and periodic term limits for elected Federal policymakers, what's wrong with periodic review of Federal regulations? What's wrong with a commonsense approach to the massive regulations that we already have on the books?

Mr. Chairman, those are my comments this morning. And again, I appreciate your attention to this legislation, and also addressing a new frontier in the area of regulatory reform, and that is in the form of our bill, the sunset provision. Thank you.

Mr. MCINTOSH. Thank you both very much for coming today. It sounds like we might refer to this as term limits for regulation, if Mr. Mica's comments are to be taken to heart. Let me start off with a few questions on some of the criteria and how the bill would act in certain cases. I'll ask a few questions, then some of my colleagues may as well, and if there are still a couple things down the line, I may come back and ask you some more questions.

The first criteria that you have in determining whether a regulation should be continued after the 7-year period, or 3-year period if it's a new regulation, is the extent to which the regulation is outdated, obsolete or unnecessary. Are you aware of any other law that requires an agency to review its regulations to determine whether they're outdated or obsolete or unnecessary?

Mr. CHAPMAN. Mr. Chairman, if I may, I think the administration would suggest that that is an ongoing process that occurs at the agency level—not only this administration, but previous administrations. To my knowledge, I don't know that there is any statutory requirement anywhere. Although I would expect that the President—this President and previous Presidents—would say, by Executive order, they have ordered such a review.

The problem is that it hasn't been effective. It hasn't worked. And often cases, it's been ignored. I think it is time that we place, in the statutes, some kind of formalized process by which this will occur. That way we know, we will have confidence that this review is going to take place. And if the agencies choose to ignore the direction of the public law, the sunset provision will operate.

I think that would finally, hopefully, get the attention of the Federal agencies and would force such a review under the criteria that the chairman is talking about.

Mr. MCINTOSH. Mr. Mica.

Mr. MICA. Well, part of the problem, of course, with the whole mass of regulations stems from the mass of laws that Congress has passed. You can't pass a regulation without legislative authority. And I don't hold the bureaucrats solely to blame. They're just carrying out the mandate of the Congress. What we propose here is, again, a periodic review by legislation. And we're imposing this by legislation, setting a legislative standard for that periodic review.

And we think in a reasonable timeframe, giving agencies also the discretion to be a part of the process. I think that as soon as we started talking about this, and as soon as the regulatory reform legislation appeared on the platter of the House of Representatives, the administration quickly acted to introduce an Executive order, which does call for a review of all existing regulations by, I think, June 1, sometime this summer.

If it can be done in that fashion, with an Executive order, fine. But as you've heard from my colleague, other Presidents have attempted to address this need by Executive order, and it has failed. So I maintain that the only way to bring this into order is by the same process that we've brought the disorder, and that's legislation. It will set a standard. It will be the law. And regulations and

other edicts that are put in place by these agencies must conform to the standard we set.

Mr. MCINTOSH. Would it be essential that the agency determine that a regulation was not obsolete or unnecessary in order for that regulation to continue, under your legislation?

Mr. MICA. We have a process by which they can evaluate the need to continue a regulation. And in fact, there are many—we have never advocated any elimination of all regulations, as much as some people might like that. Being realists, you do need to regulate some of the conduct of business and industry and other activities. But again, what we do is we set a standard.

We require a review. If they can justify the continuance of a regulation, it will proceed. Again, from time to time, regulations do need updating, with advances in technology and in other areas. So I think we've addressed most of the potential problems with this legislation. But of course, the product may not be perfect, and we welcome any suggestions or amendments.

Mr. MCINTOSH. Not to be too legalistic, but essentially the presumption is that unless a regulation met those criteria, it wouldn't go forward after the 7 or 3-year period; is that correct?

Mr. CHAPMAN. Basically, we can't mandate an objective review, if you will, of every regulation and anticipate the precise criteria. That's why we say that the agencies, in reviewing this, will take into consideration the 18 criteria that are listed in the bill, that are all basically a commonsense approach. Then, obviously, the agency will have to balance, in looking at that.

Once those criteria are applied, the agency is going to have to balance those criteria and make what we hope will be a commonsense judgment about whether or not that regulation ought to continue. One of those, Mr. Chairman, as you point out, would be, for example, is the regulation obsolete? I would note one of the interesting examples of how we get behind the curve on this is, the Department of Transportation didn't remove the last rules governing the Civil Aeronautics Board until 1992, although the CAB ceased to exist in 1984, 8 years before that.

So we had regulations on the books applying to the CAB for 8 years after there was no CAB. Now, that's the kind of foolishness that we ought to address. And if you review, on a periodic basis, whether or not regulations are obsolete, I hope we would have picked that up and done something about it. So, sure, I think it's a commonsense approach.

Mr. MCINTOSH. Thank you. Mr. Peterson, do you have any questions?

Mr. PETERSON. Yes. I apologize for not having had time to review this to a greater extent. But I'm trying to understand—you have a 7-year period for existing regulations and a 3-year period for new regulations. Can you explain to me how you came up with that criteria?

Mr. CHAPMAN. Speaking of subjective decisions, Collin, the answer to the question is, as a new rule is promulgated and becomes final and goes on the books, the thinking of Mr. Mica and myself was, if a mistake has been made, we ought to have an opportunity, on new regulations, to take a look within a window that is a bit narrower than 7 years. So the initial review would occur within 3

years of the regulation becoming final. Then after that, on a 7-year basis.

That is borne from a view, basically, that new rules may be doing a lot of damage a lot sooner than we would hope. And therefore, we ought to take a look at them a little earlier.

Mr. PETERSON. And then the 7 years, that cycle is every 7 years, there would be another review of this rule and justification of it.

Mr. CHAPMAN. That is correct.

Mr. PETERSON. One of the things that I am concerned about in what we're doing here is that we may be adding a lot of bureaucracy trying to undo the bureaucracy, you know? And that we're layering another whole layer of criteria on top of the Administrative Procedures Act and everything else that we've got that's supposed to be making sure that these regulations don't run amuck.

Have you looked into the process? As I understand it, the administration is doing this kind of thing now. How does this dovetail with what the administration is currently doing? I've seen some information there that a good part of 26 percent of the regulation work is redoing or reviewing existing regulations. And only 9 percent are new regulations. So they already are spending a lot of their time reviewing, and there's some kind of a process.

As I understand what you're doing here, you're formalizing or setting into the statute a specific process that they'll have to follow. My question is, how does that dovetail with what they're doing now, or doesn't it?

Mr. CHAPMAN. Yes, very nicely.

Mr. MICA. We think it dovetails, again, very nicely. We set out—it doesn't require anymore bureaucracy. It says the head of each agency shall designate an officer of the agency as regulatory review officer of the agency. So we'll be able to pinpoint that responsibility in an existing individual or a designated officer. I think that what the administration has requested really does sort of a cursory review of regulations.

And they've mandated it in a very fast time order. So they in fact do some of this, but there are not the constraints that we have put in here, the criteria by which they must justify the existence, extension or termination of the regulations. So we've set, I think, a better standard, and we've set a better timetable to have a real review take place.

And we have, again, done this, I think, without adding to regulations or personnel or it complicating the process. We've tried to use as a model, too, previous experiences with reviewing regulations.

Mr. CHAPMAN. And let me add to that, there is no additional bureaucracy in this bill—none. Now, the legislation that I introduced in the last Congress had a level, created a commission, a sunset commission. And I think that, with Mr. Mica's help, that this is a cleaner approach in which previously the genesis of this legislation would have added another agency to review all Federal regulation.

This simply keeps it within the agency, to the extent that the administration—this administration or even the previous administration—argues that this is a process that goes on all the time, I hope that's correct. But the problem, Mr. Peterson, is, it is a process that goes on all the time in which the agency picks the regulations they want to review. They don't review them all.

And what is the remedy, what is the relief for the private sector that is being killed by Government regulation? And the agency just says, well, we don't think we want to review that one. The 26 percent of the time that we're spending reviewing regulations, may be on something else. And the review may be to figure out how to add additional regulation.

This finally reaches in, this bill will, without creating any additional bureaucracy and says, Mr. Agency Head, you've got to review them all; we want you to look at all of them on a periodic basis.

Mr. PETERSON. Now, the 7-year period for existing regulations, if this passed, would apply to everything that's on the books at the present time. So how would it work, then? Would they have 7 years in which to review all of those regulations so that there's potential, then, that there would be a certain amount of these regulations we wouldn't ever get up for review for 7 years? And they would be able to decide which ones they'd look at first and which ones—I mean, how does that process work?

Mr. CHAPMAN. You identify the problem. It's the real problem in that within that 7-year window, the agencies would have 7 years in which to conduct a review of existing regulation. But I think that's a practical approach, understanding we couldn't force them to review every regulation in the next 6 months. It would be wonderful if we thought we could do that.

But I think the practical problems of doing that would create an impossible agency burden. And we're not trying to be unreasonable. We think while certainly it would be nice if some of these things could be done in sooner than 7 years, if we get it done in a 7-year window, that will be something that's never happened before in the history of the Republic. And that would be something that I think would be good.

Mr. MICA. We do set out, in the bill, a process by which each agency can set up a schedule for review. And that will be published and people will know when it's going to be done, and it will be done in an orderly fashion. So we set out some timetable. And actually, they're participants in the process, and I think they should favor it in some fashion, rather than be called on from time to time for a crash review.

Mr. PETERSON. Thank you.

Mr. MCINTOSH. Thank you, Mr. Peterson. Mr. Shadegg from Arizona, also, if you'd like to put into the record, we can provide for that at the beginning part of the hearing record.

Mr. SHADEGG. I'll just put my opening statement in in writing. Gentlemen, let me start by complimenting you. I am totally sympathetic with the goals you seek to achieve. I think we are, indeed, in serious trouble in this Nation because of a regulatory burden that has grown excessive and is overlapping between different agencies. I have to say, however, that I have concern about this particular approach.

In the Arizona Attorney General's Office, I spent 8 years working in this arena. And a good portion of it dealt with the fact that we had a sunset law for statutes in Arizona. In, I believe, something close to between 15 and 20 years of sunset laws in the State of Arizona, we eliminated exactly one agency; and it was a very, very, very small agency.

In every other instance, the Sunset Law, at least when it looked at sunseting statutes, resulted in the agency coming in, making a case for why it needed more power and more authority and more money, and it got it; which was taking us in exactly the wrong direction. I have somewhat of the same concern here. I wonder if you have thought that issue through and if you have looked at any other States or any States that have provisions for sunset of regulations, as distinguished from laws.

Mr. CHAPMAN. My experience in Texas is the same as yours—that there is a sunset review process for the agencies of the State, but not the regulations of those agencies. And our experience in Texas has been not dissimilar, Congressman, to your experience in Arizona. I would hope that—I mean, I think that as a failure, though, of the process, not a failure of the goal.

What we try to do, I think, here is hopefully provide that in the Congress and at OMB and within the private sector, there's going to be input into this process. And I would hope that we would certainly, not by this review, do anything that would encourage additional regulation. Certainly if the criteria are applied, which we set out. Those 18 criteria are not designed to increase regulation, they are designed to eliminate regulation.

And if the agency follows those criteria, it is impossible for me to imagine circumstances under which this could be going in the wrong direction.

Mr. SHADEGG. I share Mr. Peterson's concern about bureaucracy, not in the sense of more people, but more people within the agency or the agency simply churning regulations to a greater extent. You apparently considered in legislation last year, either the creation of a separate entity that would review the regulations of the various branches of the departments of the Federal Government and abandoned that idea.

I see some merit to that kind of proposal, where there's an advocacy situation—somebody outside the agency looking at it saying, is this really a good regulation, is it necessary, is it excessively bureaucratic; actually applying the criteria you've written, but not doing it from the inside, where you've got the fox guarding the chicken coop.

Mr. CHAPMAN. I agree with you, and the concern you expressed was what drove me to that particular legislative approach in the previous bill. Let me tell you what I think we have done that lowers the bureaucracy and addresses that issue within the agency itself, because the review process specifically calls for private sector input and the publication of the results of the agency review in the Federal Register.

Which means, we're going to put the world on notice that this process is occurring as to a particular regulation. And that review process can then involve input from other than the fox in the hen-house, if you will. If, in fact, what we see as a result is an agency recommendation contrary to, let's say, what the private sector believes is the appropriate approach, then, once that agency recommendation is made, it is made to the appropriate committees of the Congress that have jurisdiction over that, and it is made to OMB.

It is there, then, in a separate forum, that there is an opportunity to work once again with that agency to try to correct what the fox in the henhouse might have done. And if it still is a problem, then our legislation provides a window of time from the final decision of the agency in which Congress can act. And I think that is the ultimate arbiter of the issue, is if something egregious is going on, then it is the Congress that will have an opportunity to address that.

Mr. SHADEGG. Let me ask kind of a followup to that which is, often we see conflicting regulations. Earlier this year, I heard a story about a particular restaurant industry where there was a requirement that a certain type of glove be worn while cutting carrots so that workers would not cut their hands, and that was required by, I believe, OSHA. And at the same time, another agency of the Federal Government having to do with health, strictly forbade the wearing of those same gloves in the exact same process.

Two conflicting regulations right in the face of each other. How does your legislation address that? And does the elimination of an independent agency to review those make that process worse?

Mr. MICA. Well, I wanted to respond pretty quickly to what you said about the ineffectiveness, sometimes, of sunset legislation if I may first. I come from Florida, and we have sunset legislation, have had it for some time. And I would probably concur that the results are somewhat the same—that very few things get sunsetted. But there is a periodic review.

And I guarantee you, as an elected official, when those sunsets come up, you hear from individuals and you make improvements in the legislation, has been my experience in the State legislature. Also, we have, as my cosponsor has indicated, we've set up a process for input here. I guarantee you that we hear from constituents. But when you set up this process for review of regulations, you will hear from those who are regulated.

And you'll hear from them, we know, on a periodic basis, not on a hit and miss basis, depending on what action the Congress is taking to get some action out of administration or what political opportunity there is for a President to enact an Executive order. They will know that they have a shot at improving the rules by which we regulate business, industry, agriculture, the whole gamut of our activities in this country.

So I think that it will provide a good forum and a good process without the bureaucracy. We already know some of this is being done. And you'll hear the administration, I'm sure, and other people come in and tell you that they've hung the moon and the stars and everything is in equilibrium.

Mr. SHADEGG. Mr. Babbitt says, just trust him.

Mr. MICA. That's why they have the Congress. We pass these laws that pass on the regulations, and now we have to get the regulatory process under control.

Mr. SHADEGG. Thank you.

Mr. MCINTOSH. Thank you very much. Mr. Condit.

Mr. CONDIT. Thank you, Mr. Chairman. I'm going to follow up on a couple of questions and just be real direct. I think your critics will say that this creates a bureaucracy and costs the taxpayers

more money. Can you categorically say that there is no additional cost to us doing this?

Mr. MICA. Maybe in his prior legislation, before he had the wisdom that I've transmitted to him, but in this legislation, I see not.

Mr. CHAPMAN. There is no authorization, Mr. Condit, for any additional bureaucracy in this legislation. If there is going to be additional energies directed toward the review of regulations, that is precisely the outcome we hope to achieve within the agencies. To the extent that the energy of the agency is directed toward a review of the existing regulatory scheme, that is precisely what we hope will happen.

There is no authorization for any funding to add Federal employees to do this. It is a mandate that is required by the bill within the agency to the extent that the administration will testify—at least this administration—that 26 percent of their energies are currently going toward—if that's the number, and I had not heard that until I heard it here this morning.

If that's the case, then what we want to do is focus that 26 percent on those 18 criteria, and bring some common sense to the process. I hope that is right. I hope that even a higher percentage than that level is going to be doing something that stops or reduces the regulatory burden on the country.

Mr. CONDIT. CBO's projections of hundreds of millions of dollars is sort of outrageous and out the window? You don't—

Mr. MICA. I think it would be. Of course, you know, it depends on who's asking for this. Now, if you're asking to review all the regulations by this summer, it can be done with existing resources and can be done in an orderly, cost-effective fashion. But if the Congress is setting forth some standard for a periodic review over 7 years to set some pattern of responsibility for the continuation or elimination or review of regulation, the kings and queens of regulation will probably tell you that it will cost too much, and this is going to put another burden on them, and no, OSHA could never operate under these constraints, and EPA would be hard-pressed to continue its existence or civilization as we know it, under these terms.

Mr. CONDIT. Thank you. Given the history of Texas, Arizona, California and the Sunset Law, it appears that it's questionable whether it truly achieves its objective of eliminating agencies and regulatory things. It appears also that possibly the regulators become preoccupied with justifying the regulation. And that's sort of the game that we're in—you give us 120 days to review it to Congress.

I would take it that it's incumbent upon Congress to sort through that and empower ourselves and see our way clear of seeing that this is a game and we need to do something about it. Do you have any suggestions on how we empower ourselves to get through that and truly sort out what is needed and what's not needed?

Mr. MICA. We have a good process, Mr. Condit. It involves the agency. It involves the regulated and the public. And it involves the Congress. And we think that that combination is a winning combination. Maybe it will need some adjustment down the pike, but we think that we bring together the forces that will bring about positive change.

There's no guarantee in any of this, but again, there's no guarantee in the process under Executive orders, which have been the approach to date. There's no guarantee under the mass of regulations that we've accumulated in finding some way to sort through them. The hardest thing we would be charged with in this Congress is getting involved in some other manner in redoing those regulations. This gives us a process, an access.

And we think, again, we couldn't have created anything that brings more of the forces involved in this. We won't, maybe, eliminate all the regulations or operate in the same fashion that sunset legislation has operated. But I think we can, again, have a mechanism to make this process more positive and get some of the regulations in tune with what they should be, and eliminate those that shouldn't—

Mr. CONDIT. There is some people who have criticized the bill because it exempts Congress. And my time is out, but I'm not being critical, I just—would you respond to that, please?

Mr. CHAPMAN. Well, to the extent that this applies to the executive branch, if we want to apply it to the legislative branch, I think that would be fine. But this is a regulatory sunset bill. It is one of the things we've tried to be very careful about in honoring the Constitution's separation of powers, and providing that, in this process, Congress' role is traditionally one of legislation.

Let me add to what my colleague said, Mr. Condit, briefly, about how this may be different than the experience, and we expect it to be different than the experience some States have had. Never has there been legislation that defines a precise moment in time at which a regulation is going to be reviewed and looked at. That has never occurred.

This bill, for the first time ever, will do that. There will be a moment in time. If there is a particular problem in the agriculture industry in California or a small business in East Texas in which you or I, to seek that relief, currently have to introduce legislation and pass it through the entire Congress to get relief from some regulation written by a bureaucrat in the bowels of some Federal building in Washington, DC.

That's our only relief. And it is a high burden to climb. The agencies know that. I have, and I expect every Member of Congress has had those occasions, in which I have called to inquire of a Federal agency head, how in the world could you have taken the law that Congress passed and tortured that law to the extent that you have written this regulation? And the response basically is, Congressman, if you don't like our regulation, pass a law and change it.

So by regulation, with the unelected, they are requiring things to happen that they refuse to fix unless Congress acts with part of the United States Code. I think that is outrageous. And the problem is that it is extremely difficult, as we all know, to address an issue like that. This bill, for the first time ever, will define a moment in time when that egregious regulation will have the light shining on it.

It will have its day in the sun. And we will have an opportunity, as will the private sector, and as will the agency, to correct those kinds of errors that have occurred. And we ought to have that process in place.

Mr. MICA. I might add that we have a periodic review, established by a regulatory document that was adopted in 1787, called the Constitution, that provides for a 2-year review of elected officials. We passed the laws, again, that pass on these responsibilities to the bureaucrats. And when we look at term limits of, like, 6 years or 8 years or 12 years, I think we'd be doing a great disservice to this country to leave the bureaucrats in charge, and with the regulatory power that has just gone amuck in this country, and not have something in place like this periodic and reasonable review that we've set forth.

Mr. CONDIT. Thank you.

Mr. MCINTOSH. Thank you, Mr. Condit. I'm actually reminded by your question of a dinner Mr. Scarborough and I were at last night. The conversation came up on the problem with the ergonomics rule. And there was a suggestion made that maybe it and other rules should be applied first to Members of Congress for a year and then to the general public. So I don't know whether that might solve some of that problem.

Let me now recognize Mr. Scarborough. He's indicated he needs to head on to another hearing.

Mr. SCARBOROUGH. Thank you very much, Mr. Chairman. And by the way, Mr. Mica, I won't ask you whether you're going to be supporting term limits or not, based on your previous comments. I do want to follow up on Congressman Condit's question, regarding how do we empower ourself, because that's a question that, reading the legislation, that's a question that I have.

I think this is a great step in the right direction, fantastic idea. My question is this, though, what if we have the sunset provision and let's say an agency like OSHA, for instance, spends the 7 years justifying every single regulation on the book? I know we talk about the input that we have in this process, and the input that private industry and citizens will have in the process. But what do we do after 7 years if an agency such as OSHA keeps every single regulation on the book?

Mr. MICA. We have a couple of remedies. Congress is still in charge, no matter what they think in OSHA. So I think you have legislative ability to correct the situation, which we from time to time do. We review their legislation. We also have appropriations authority. And I think you may have joined me and others in sending a \$3.5 million message down to OSHA to get their act in order.

So we have other tools at our disposal. But this, in fact, does set again, this long overdue periodic and orderly review of regulatory process, which has gotten out of control.

Mr. CHAPMAN. You ask a question that I addressed in trying to figure out, how do we increase the size of our hammer, or how do we increase the reach of the hammer.

Mr. SCARBOROUGH. Right.

Mr. CHAPMAN. Our ability to impact what that agency does. What I found was, is I began to tread on the constitutional separation of powers. As I was, in drafting, trying to figure out how to do this, my inclination was to try to reach and grab OSHA by the throat and shake them and say, you've got a crazy rule here; one with, perhaps, unintended consequences, or one of the things that are in our criteria.

What I think we had to do was balance the ultimate power of the Congress to pass laws with the ultimate power of the executive branch and its constitutional authority to make rules. My temptation was to do what I think your question implies; and that's figure out how to enhance the size of our stick. What we try to do here is be careful that we don't tread on the separation of powers, but yet maintain our ability to have an impact on this process, to have input to the agency, as the private sector will, and to try to influence the ultimate decision that agency makes in whether to renew, modify or terminate a regulation.

However, I think we have to be careful in our approach that we do not run into constitutional objections if we have somehow—during that process, we cannot impose our will, I don't think, short of doing what we do, which is pass laws in the Congress. Ultimately, that is the hammer.

Mr. SCARBOROUGH. Right. OK, thanks. Mr. Mica, let me ask you a question. As I understand it, President Clinton said he is going to conduct his own regulatory review in the coming months. Why don't we just trust President Clinton and leave it to him? Is there a sense of urgency? And I ask this of you because you're one of the most bipartisan members, I think, on this entire committee.

Mr. CHAPMAN. That's sort of how I view him.

Mr. MICA. Well, this is all a political process. And the reason that you saw half a dozen pieces of legislation in the regulatory reform area was not because Mr. Condit and I were successful last year, and others, in stopping EPA from becoming a cabinet level and looking at the whole regulatory process, but because I think the people of this country have just gotten fed up with regulations.

And the reason the Congress acted is because we tied the country up in regulatory knots, and there's a rebellion against it. There is a silent, and now loud, rebellion against regulation. And all the things you can say about President Clinton—and I'm a partisan—but he also is getting the message. And that's why he introduced this Executive order. So he's responding.

The process does respond—the Congress and the administration. But we think the important thing is to take a step that preserves a reasonable process for review, again, of the regulations in some sensible fashion. And that's what we've outlined. We've tried to bring the agencies into it. We've tried to create a simple process without expense. And you may hear testimony to the contrary. But we're submitting what we consider, again, a reasonable, cost-effective approach to make the process work.

Mr. CHAPMAN. And Mr. Scarborough, let me say this. I think you ask a key question. We know what road is paved with good intentions. I think the good intentions have existed in the administrations and at the White House with every President for at least the last four. So Mr. Clinton probably has the best intentions in the world. The problem is, neither in this administration nor in previous administrations has the executive branch, the career bureaucrats, the people who make a living writing these regulations and enforcing them, they just say, that guy down at the White House—whatever stripe, whatever flavor, whatever party—he's going to be gone in 4 or 8 years, and we're not; we're going to be here.

And that's the problem, I think. That's why Congress, I think, ought to address this issue, and this legislation ought to pass. We need to put that process in place in a way they can't ignore.

Mr. SCARBOROUGH. Well, I thank both of you for your work on this. I think this is a great step in the right direction. I appreciate it. Thank you, Mr. Chairman.

Mr. MCINTOSH. Thank you, Mr. Scarborough. Mr. Gutknecht, do you have any questions for our colleague?

Mr. GUTKNECHT. Yes. Thank you, Mr. Chairman. I have a couple. In fact, I'm reminded, listening to this discussion—and I just want to compliment both the authors. You've done an excellent job, I think, of not only presenting the bill, but answering the questions. I'm reminded, though, of I think it was from the Union Pacific Engineers Railroad Manual, a passage that went something like, if two trains should approach each other on the same track, both shall come to a complete stop and neither shall advance until the other has passed.

And I am concerned about these conflicts between the agencies, where one says do this, the other says, do that. And somehow they're not able to sort this out. In your opinion, do you think there's a need for a statutory mechanism to help them sort out these differences between the agencies? I mean, can't this be done by the administrative branch by itself? Do we need something in statute? Does it take an act of Congress to—

Mr. CHAPMAN. Well, certainly, those conflicts exist in the regulatory scheme today, and the regulations are replete with those conflicts. I don't know that a statute is going to resolve the fact that those conflicts exist. It's between, perhaps, the perceived or real different missions of various Federal agencies. But certainly, the current scheme hasn't seemed to solve the problem. And if statutory guidance is helpful, we certainly can do no worse than, I think, the current scheme.

And I don't think the commonsense criteria that exists here that say we ought to attempt—it's not manageable, we ought to attempt to reconcile those differences, and that ought to be a consideration in the review, that those things happen. I have, in my statement that I have submitted for the record, several examples of where Agency A and Agency B have issued conflicting regulations, and the result is mayhem in the private sector, trying to figure out, whose rules do we follow?

So the current scheme doesn't seem to be working so well, so perhaps statutory guidance is something that will be helpful.

Mr. MICA. I didn't have a chance to discuss, or meet in the past, Albert Einstein. But I think if we had an opportunity to discuss bureaucracies, his analysis would basically say that they're inert objects, and they're only moved in a certain direction by a certain outside force. And I think that that would be the law that we have to go by here—that these agencies will respond if they have the proper guidelines and that force applied to them. And that's what we're doing with this legislation.

Mr. GUTKNECHT. On this committee, I've talked about, and we've heard a lot of testimony about what I would describe as \$50 dollar solutions to \$5 problems. And we see that every day, it seems to me, with regulation. And so I'm also interested in Criteria #4

where you say whether the benefits to society from the regulation exceed the cost to society from that regulation.

In your opinion, and this is more just for the record and for my edification, in your opinion, should regulations ever be reissued if it becomes clear that the costs far and away are better than the benefits to society?

Mr. MICA. Well, I was involved in last year's using cost benefit analysis. I think it's important that you do take cost and benefit analysis into the equation. It has to be done in a reasonable fashion. And I think the same commonsense approach should be done here. You can't spend billions and billions of dollars in some way that doesn't have good results.

But we're also dealing, sometimes, with the human health safety and welfare. And you must balance the end results with the regulation. But unfortunately, we haven't really used cost benefit analysis to the degree it should be in the adoption of regulations in this country. And we should go back and they should be subject to the criteria that we've set here. That is an important criteria.

The bill that we passed dealing with risk assessment and cost benefit analysis used a similar criteria for regulations in the future. But there's no reason that that should not be applied to this mass of a million-plus pages of regulations in the past. If it makes sense for what we're going to do in the future, and what this Congress and the House has passed by a wide margin—and every time we had a vote on cost benefit analysis, it passed by a wider and wider margin.

It certainly makes sense to go back and look at what we've already put on the books.

Mr. GUTKNECHT. I'm delighted to see it in the bill. As a matter of fact, if anything, I would put a sentence at the end, "and we really mean it," because sometimes it's ignored.

Mr. CHAPMAN. Congressman, let me add, there is no way that we could today or ever quantify with a dollar sign perhaps whether or not a regulation that impacts the health and safety of the citizens of our country, that we could put a dollar sign and say, this is the amount, and if we exceed this amount, then to heck with the health, safety and citizens of the Nation. That's not what we're trying to do here.

But as an example, what we do hope to catch—and these are real life examples, real world existing regulations—under one analysis, it will cost \$119 billion to avert one death under the Formaldehyde Occupational Exposure Limit. Now, that's not, in my judgment, a good investment. It would cost \$4.2 billion to save one life under the Hazard Waste Disposal Ban. Agencies ought to look, when the cost benefit analysis get to those kind of numbers, agencies ought to look at that.

And someone with a little common sense ought to apply some common sense as to whether or not we've overreached.

Mr. GUTKNECHT. Thank you.

Mr. MCINTOSH. Thanks, Mr. Gutknecht. Mr. Peterson, do you know whether Mrs. Slaughter has any questions.

Mr. PETERSON. I don't.

Mr. MCINTOSH. Perhaps what we could do is keep the record open. And if the two of you would be willing to work with us, there

may be some additional questions. I know I do on judicial review and the effect of the statute when there's a statutory mandate to issue a regulation—which of the two statutes would prevail in that case?

But in the interest of getting on to the rest of our witnesses, perhaps we could work with both of you in establishing that record in a series of written questions and answers.

Mr. CHAPMAN. Mr. Chairman, we would be happy to respond.

Mr. MICA. Mr. Chairman, I'd be happy to respond. And I just want to also thank, for a moment, Mr. Paul Mashburn, who is going to be a witness, I believe, in the next panel. He's a good friend; someone I've known in the business community over many decades in central Florida. He will be testifying on this matter, and bring to this panel a first-hand account of how the regulatory process has been distorted and affects his business in an important industry in Florida and our country.

So I thank you for the opportunity, again, to present this bill.

Mr. McINTOSH. Thank you. Thank you both for coming and joining us today. You've done great work here.

Mr. CHAPMAN. Mr. Chairman, thank you very much for this opportunity.

Mr. McINTOSH. Welcome. Our next witness is Ms. Sally Katzen, who is the Administrator of the Office of Information and Regulatory Affairs at OMB.

[Witness sworn.]

Mr. McINTOSH. Thank you. Ms. Katzen, thank you for joining us here today. I appreciate you coming. We'll, I'm sure, be seeing a lot of you in this and future issues. Please give us the administration's views on this legislation.

STATEMENT OF SALLY KATZEN, DIRECTOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS

Ms. KATZEN. Thank you very much, Mr. Chairman, members of the subcommittee. I appreciate the opportunity to discuss H.R. 994, the Regulatory Sunset and Review Act of 1995. I have listened with interest during the last hour, hour and a half, and heard a number of good things said about this bill. In my written testimony, which I would ask be included as part of the record—

Mr. McINTOSH. It will.

Ms. KATZEN [continuing]. I state that it begins with a good idea, a sound idea, a sensible idea. But then it takes a few wrong turns. And I set forth, in the written testimony, and would like to just very briefly summarize some of the problems that I see with the bill as drafted. First, it is open-ended in scope. It applies to every regulation—those in effect and those in the future—without any of the traditional exemptions that one ordinarily finds under the Administrative Procedure Act, including rulemakings related to public property, loans, grants, benefits, contracts, military affairs, national security affairs, and foreign affairs.

And depending on how one interprets the exemption for a routine administrative function of an agency, the bill can sweep up enforcement manuals, interpretive guidance, basically all the written documentation that an agency has in implementing a regulatory program. Second, the 18 review criteria which we've been discussing

this morning. Taken individually, each of these reflects common sense and sound objectives to consider in developing a regulation.

But taken together and embodied in a statute that permits judicial review and in a statute which uses the word "shall"—and we do take it seriously when a law is passed and says, "you shall do something"—I think it creates a trap that sets forth inconsistent, even contradictory, standards and will lead to endless litigation. A couple of examples—my favorite regulatory approach is performance standards.

Tell a regulated entity where you want them to be, not how to get there. On the other hand—and that's Criteria 18—we find Criteria 15, "to minimize needless litigation." You can pull every lawyer in the Justice Department, every past lawyer from the Justice Department and every lawyer in private practice—it is easier to follow cookbook litigation of command and control: did you dot the i; did you cross the t.

So to minimize litigation, you want precise standards; at odds with performance standards. It's a conflict, and which of those two do you go to? Similarly, some of these criteria, I think, invite endless litigation. One is whether a regulation is based on adequate and correct information. It's sort of like there's no perfect point to draw the line. You can always have somewhat better information if you wait another week, another month.

It's like editing a brief. You can keep doing it and keep doing it. Fortunately, there's always a court deadline where you have to submit the piece of paper, and it's as good as you can get in the time allowed. Some of the other issues—whether the regulation is worded as simply and clearly as possible. I think regulations should be intelligible. I think, as an aspirational value, it should be simple and clearly worded.

But you can give any number of very good lawyers the same text and they will refine and keep refining and keep refining. There is no point at which it is as simply and clearly as possible. It doesn't occur; it can keep getting better. So how you handle some of those issues. What I'm concerned about—and we heard earlier that this is a balance that the agencies are to do.

But there is a provision for judicial review here, up to the first 30 days after the report is filed in Congress. And I'm reminded that when a judge, or a nominee for a judge, goes before the Senate Judiciary Committee, it is usually the conservative Members of Congress—both Democrats and Republicans—who will ask a judge, now, if this case comes before you, are you going to substitute your own judgment; are you going to make your own decision?

And if the judge nominee says yes, then people say, wait a second, that's an activist; that's too assertive; you should be simply applying the law and not substituting your own judgment. But here you have, really, a prescription for the judges to make these balancing decisions because there is no clear guidelines. Third, is the amount of paperwork. This is deceptively simple. And I use the word deceptive rather than misleadingly, because I think it is really important to understand what is at stake here.

There is a report given on this schedule, and then there is a report, a final report, on the regulations. It sounds like one final report in 7 years. But in fact, since 1982—and only 2 of those years

have been on our watch—since 1982, there are over 23,000 regulations that have been adopted. Now, some will say, well, that's a sign of the problem. And I can come back to that in a second.

But realize that if there are 23,000 regulations on the books, you're talking about 23,000 final reports; not one report, but 23,000 reports, each specifying how each regulation satisfies each of 18 criteria, with the grounds for modification. These are all to be published in the Federal Register. So I would just remind you that those of you who are worried about a million pages in the Federal Register will see an enormous jump as this process alone will be responsible for enormous number of papers.

And then, after you have this, you have comments from Congress and comments from my office. And at that point, you have modifications. With respect, assigning a regulatory policy officer in each agency—that one person cannot do it all by himself or herself. They will have to draw on the resources of the agencies, and they will draw heavily to produce this.

It's a lot of paperwork, and since the Paperwork Reduction Act—and the two of you are both conferees on the Paperwork Reduction Act, which I hope we will have through conference soon and signed by the President—would be somewhat aghast at the amount of paperwork generated by this process. There are some issues here about the underlying roles, the respective roles, of the public in commenting.

They comment during the process, but once there's a proposed modification of a regulation, they're barred by this bill from commenting. The traditional notice and comment doctrine of 553 is eliminated. I don't understand why. It seems to me, that's the purpose of rulemaking. On the other hand, you can go to court during that 30-day period after it's been filed, which means the judges will be commenting.

And I think that there's somewhat of a distortion in what has been seen as the respective roles. I'd also like to note that H.R. 994 will terminate regulations, but it has no effect on the underlying statute. And the statutory obligations will, therefore, remain. But the regulated community will be left without the guidance, the clarification, the questions and answers, and, if you will, the dos and the don'ts that help them sort through their legal obligations.

That's a conundrum for a lot of companies. You know, we hear so much about how many regulations there are. But sometimes, they actually want them. Take, for example, the automobile companies and the brake regulations. They want them because if the DOT issues them, then 50 States won't have 50 different regulations. If you terminate the DOT regulation in that circumstance, you still have an obligation for safety and you have 50 different standards that could take its place.

So it's the regulated community in some instances that will, I think, be disadvantaged with the termination of the regulation without any action being taken on the underlying statutes. Now, I've used my time, but I want to come back to the main point, which is, the objective is right. We agree; there are too many regulations on the books. Some are too costly, some are too invasive. We're doing our bit—and I think it's a big bit—to help this particular issue.

The President has stressed on a number of occasions, as recently as February 21, that he wants the agencies to do what he calls a "root and branch" investigation of all the regulations, and report to him. He specifically instructed the agencies to file a report by June 1, identifying those that can be done administratively. And, Mr. Chairman, he also asked for an indication of those that would have to require legislation to be implemented, so that we could begin to put together a package for Congress to show where we would like your assistance in this process.

This is a serious effort that is being undertaken. And that is because we believe that there is a need to review existing regulations. We do not disagree with the objective. The issue is, how to do that. And what I am concerned about is, like the regulatory system itself, a very good idea, will produce, here, bad law. Just as you complain, legitimately, that a good regulation is overenforced, zealously enforced, pushed too far, made too costly, I think that's the problem with some aspects of this particular bill.

I'm not opposed to the concept, it's the way it's carried out. I'd also like to mention two other things that came up in the earlier statement. We talk about drowning in regulations. We talk about the 23,000 regulations that are on the books since 1982. I want to mention a few of those regulations, because I don't believe that the American public thinks that they're the cause of drowning.

Recently we have seen a Veterans Administration regulation authorizing Persian Gulf war veterans to claim benefits. That's a regulation. That's on the books. That's subject to this legislation. I don't think that there's a single person who believes that that is burdening the American public. We've seen from SBA regulations setting the qualifications for small business loans. Small businesses in this country need loans from SBA. You have to have qualifications and eligibility to receive those loans.

I don't hear a single small businessman complaining that they're eligible for a small business loan. But that's 1 of the 23,000 regulations. It's on the books. Agriculture—if fruit comes in with the med fly on it, you need to quarantine that area so that the med fly doesn't attack the rest of the crops.

That's done by regulation. The farmer whose product is quarantined may complain, but I honestly do not believe that the American public believes that a regulation quarantining the med fly is burdening the American public and that we are drowning in that kind of regulation.

Same with importing beef. Same with the DOT, the Department of Transportation—it's setting the course for the America's Cup. It does that through the Coast Guard, and it does that so that ships don't run through the line when the sailboats are coming through. Now, the ships may say, oh my gosh, burdensome regulations.

But we have the America's Cup coming up the coast, we need to make sure that you have a balance between access to the course and the ships who are coming through. And those are done through regulation.

Now, I go on on this area just to point out that not all regulations are bad, not all are stupid, not all are without merit. And what is needed is judgment. But what is set in motion here is a process that will have the agencies consume their resources looking

at every single one against an 18-step process. That, I think, is not the most productive use of our resources.

It doesn't take much to determine those, such as the EPA regulation that Congressman Chapman referred to, in which, when a regulation was issued, EPA acknowledged in the preamble, it didn't want to do it. But there was a court order requiring it to and a statute that made it do it. We can identify those areas, and that's our objective. And I think that's a much more productive way of proceeding.

I would also encourage you to look at the Senate bill S. 291, which was reported out of Senate Governmental Affairs on a 15 to nothing, bipartisan basis. It has a look-back provision that is a different variation, which I think is a reasonable approach. And I would encourage you to keep working this area, keep thinking about how to do it, but to try to avoid some of what we've identified as the pitfalls of this particular approach.

Thank you, Mr. Chairman. I'd be happy to answer any questions.
[The prepared statement of Ms. Katzen follows:]



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ADMINISTRATOR
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STATEMENT OF SALLY KATZEN
ADMINISTRATOR
OFFICE OF INFORMATION AND REGULATORY AFFAIRS
OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE
SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH,
NATURAL RESOURCES, AND REGULATORY AFFAIRS
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

March 28, 1995

Good morning Mr. Chairman and Members of this Subcommittee. It is a pleasure to be here to discuss H.R. 994, the "Regulatory Sunset and Review Act of 1995." This bill would require agencies to review their regulations, and on a regular basis make recommendations to Congress and then terminate, continue in effect or modify those regulations. As an action-forcing device, the bill provides for the automatic termination of regulations for which the agency fails to conduct a review and follow up with recommendations and actions as outlined in the bill.

This Administration is committed to eliminating existing regulations that are outdated, ineffective or unduly burdensome. After enough time has passed for the review of an existing regulatory program, experience suggests that we may discover that it may be more or less successful than expected; it may have been redirected in unanticipated ways to solve socially important but quite different problems than those originally envisaged; or it may have had unanticipated consequences (either in terms of costs or benefits) that suggest the program should be substantially modified or discontinued.

On February 21st, as part of a regulatory reform initiative, President Clinton outlined this problem: "We all know the regulatory system needs repair. ... Too often, especially small

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businesses, face a profusion of overlapping and sometimes conflicting rules." He specifically instructed the federal regulators "to go over every single regulation and cut those regulations which are obsolete We should ask ourselves . . . Do we really need this regulation? Could private businesses do this just as well with some accountability to us? Could state or local government do the job better, making federal regulation not necessary?"¹

The President followed up on these remarks with a March 4 memorandum to the heads of agencies, directing "a page-by-page review" of all agency regulations now in force and the elimination or revision of all that "are outdated or otherwise in need of reform."² In their reviews, agencies are to answer the questions listed above, as well as such other questions as whether a rule's "intended goal [can] be achieved in more efficient, less intrusive ways" and whether there are "better private sector alternatives, such as market mechanisms, that can better achieve the public good envisioned by the regulation." He set a date of June 1 for agencies to send him a report identifying those regulations "that can be modified or eliminated administratively and those that require legislative authority for modification or elimination."

In short, the need to review existing regulations is not in dispute -- we agree on the objective. The President has taken strong steps to initiate just such a comprehensive review of existing regulations. The issue is how to do it and continue doing it in the most effective way.

¹ Remarks by President Clinton at a Regulatory Reform Event, Room 450, Old Executive Office Building, February 21, 1995.

² Memorandum for Heads of Departments and Agencies, entitled "Regulatory Reinvention Initiative," March 4, 1995.

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Regrettably, we do not believe H.R. 994 is an effective way of proceeding. This bill starts with a sound idea -- but it is opened in scope, excessively rigid, and at times contradictory in the criteria for review; piles on so much paperwork in such short time periods that it is unworkable; and fundamentally changes the relative roles of public notice and comment, and judicial review.

Open-ended Scope. H.R. 994 provides that every regulation issued by an agency "shall terminate ... and the regulation shall have no force or effect after that termination date" unless the agency undertakes a required review. H.R. 994 applies to every regulation, both those in effect and those to be issued in the future. "Regulation" is defined as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy, other than such a statement to carry out a routine administrative function of an agency."

Taken literally, this definition is extremely broad -- sweeping up more than is published in the Federal Register as part of informal rulemaking under the Administrative Procedure Act (5 U.S.C. 553). For example, this definition would include rulemakings involving public property, loans, grants, benefits, or contracts and the military or foreign affairs functions of the United States -- topics that are excluded from the informal rulemaking procedures of the Administrative Procedure Act. Moreover, a regulatory program consists of much more than the particular "regulation" published in the Federal Register: a regulatory program also consists of the internal guidance and enforcement manuals relied on by agency staff; the written manuals, interpretive guidance, and forms provided the public; and the whole pattern of administrative and implementation practices, as formed by the underlying culture of the agency. If one interprets the exemption for "a routine administrative

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function of an agency" to include only rules of agency organization, procedure, or practice (i.e., rules to help an agency administer itself), the bill's definition of "regulation" could sweep up basically all of the written documentation that an agency has created in implementing a regulatory program.

We suspect the authors did not intend such a broad sweep and suggest they revise the language to focus agency resources on those regulations that most warrant reexamination.

Criteria for Review. H.R. 994 instructs an agency to determine if the regulations it reviews are "obsolete, inconsistent, or duplicative or impede competition" and then supplies 18 more specific "criteria for review." Taken individually, each of these criteria reflects common sense and sound objectives to consider in developing a regulation. But taken together, and embodied in a statute that permits judicial review,³ the total effect is to create a trap that sets forth inconsistent, even contradictory standards, inviting endless litigation.

For example, a regulation may focus on an issue that is within the jurisdiction of several agencies, and an effort may have been made to harmonize it with the policies of the other agencies so it will not be inconsistent (for example, the OSHA asbestos regulation that was coordinated with EPA), yet the OSHA regulation will nonetheless "overlap requirements under regulations of other agencies" (indeed, it would be astonishing if it did not since the effort to protect workers is an extra

³ H.R. 994 prohibits judicial review 30 days after the agency has submitted its final report of its review to Congress recommending continuation or changes to a regulation. H.R. 994 is silent on judicial review before that time. As a result, agency compliance with the criteria, standards, and procedures of this review process will be subject to challenge under the Administrative Procedure Act (5 U.S.C. 706).

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dimension to protecting the environment generally) (Sec. 4, Criteria #4). Crafting a regulation "to minimize needless litigation" (Criteria #15) may undermine efforts to use "performance standards" (Criteria #18), for failure to comply with engineering, command-and-control standards -- the cook-book approach -- is generally easier to litigate than a failure to comply with performance standards. A regulation that is "necessary to protect the health and safety of the public" (Criteria #16) may well "impede competition" (Criteria #3), since health and safety regulations may prohibit or severely constrain the use of certain products, or may impose opportunity costs that impede the ability of a domestic company to compete with those that are not so regulated.

How conflicting interests are balanced is the essence of administrative decision-making. Inviting judges to review these decisions without clear standards will lead to endless litigation and uncertainty in the regulated community. For example, whether a regulation "is based on adequate and correct information" (Criteria #5) or "whether the regulation is worded as simply and clearly as possible" (Criteria #6) are issues that can be litigated indefinitely. "Whether the regulation maximizes the utility of market mechanisms to the extent feasible" (Criteria #11) can raise an endless series of issues of judgment. "Whether the regulation has resulted in unintended consequences" (Criteria #17) leaves one with a constant dance of review, possible change, litigation, and yet further change. "Whether the benefits to society from the regulation exceed the costs to society from the regulation" (Criteria #4) gives economists the opportunity to serve as expert witnesses opining on the sufficiency or accuracy of the benefit and cost estimates the agency made in reviewing the regulation. And for an agency to determine whether "the total effect of the regulation across agencies has been examined" (Criteria #14) is to ask the agency to provide information that it does not have and cannot, on its own, readily obtain.

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Thus, without in any way denigrating the aspirational validity of any of the listed criteria, they cannot be used for the purposes suggested in the current form of the bill.

Three- and Seven-Year Reports. H.R. 994 requires an agency to review every regulation it has or will issue in a relatively short time -- after three years (for new rules) or every seven years (for existing and ongoing rules). The results of that review are to be submitted to Congress and published in the Federal Register 120 days before the last day of the period. Within 60 days thereafter, the appropriate committees of Congress are invited to comment. The Administrator of the Office of Information and Regulatory Affairs (OIRA) is also to evaluate each report for quality, interagency consistency, and the proper application of the 18 criteria listed in the bill. The agency is to review and consider the comments it receives from Congress and OIRA -- even if, as is likely, they are submitted on the 59th day -- and then, on the 60th day before the end of the period, the agency is to submit to Congress and publish in the Federal Register a final report and "a notice extending the effectiveness of the regulation, with or without modifications," as of the end of the period. If all of these steps are not followed, the regulation is terminated.

The amount of review called for, and the effort needed to reconsider, redraft, edit, and -- both within the agency and among related agencies -- coordinate each regulation is overwhelming. There is a vast bulk of existing regulations. Since 1982 alone, agencies have published in the Federal Register over 23,000 final regulations (roughly 1,775 a year). All of these -- as well as the ones promulgated before then -- would have to be screened for consistency with the 18 review criteria, at a level of analysis that will withstand judicial review, during the next seven years. At the same time, each agency will be reviewing each new regulation within three years after it is

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issued. Once the reviews are completed and any changes to the regulations are drafted, they are to be submitted to Congress and the OIRA Administrator for review and comment. At that point, agencies will need to react to those comments -- perhaps making rapid changes to the rules -- just at the time they may begin being sued in court.

This is, by any measure, an enormous undertaking, even if there were not other work that must be pursued by the agencies. It is, in our view, an unworkable scheme with a lot of process and paperwork for what may be little results.

The Role of Public Comment and Judicial Review. One of the more disturbing aspects of this bill is its apparent lack of appreciation for the respective roles of public comment and judicial review of agency decision-making. H.R. 994 drops the opportunity for public comment on any proposed changes to existing rules by blocking use of the informal rulemaking procedures of the Administrative Procedure Act,⁴ unless the public can comment through Members of Congress who themselves or through their staff review the regulation during their 60-day review period. On the other hand, it permits judicial review of the agency's application of the review criteria, in effect substituting for an information gathering function (notice and comment) a highly structured, adversarial proceeding (judicial review) -- by those who can afford to go to court. In either case, the opportunity for direct comment from various segments of the public on the text of an agency's proposed rulemaking -- the

⁴ We would note that section 4(c) of H.R. 994 would require an agency to "solicit comments from the public (including the private sector) regarding the application of the [18 review] criteria" before it sends the results of its review to Congress and OIRA. While these public comments may serve to identify perceived problems with existing regulations, section 3(d) blocks an agency from seeking public comment concerning the proposed solutions -- the proposed changes to the existing rules.

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basis for administrative practice since the adoption of the Administrative Procedure Act in 1946 -- has been eliminated. In addition, given the lack of clear defining standards, the Federal judges are being invited -- contrary to their established role of adjudging whether agency action is "arbitrary, capricious, [or] an abuse of discretion" (5 U.S.C. 706(2) (A)) -- to exercise their own judgment on whether an existing (or proposed revised) regulation measures up to the 18 review criteria. There is also a definite bias to the right to judicial review, for as it is currently drafted, the bill authorizes someone seeking to oppose continuation of a regulation access to the courts, but someone seeking to oppose termination of a regulation may not be authorized to do so.

Termination of Regulations for Failure to Implement Review.

As an action-forcing device, H.R. 994 provides for the automatic termination of regulations for which the agency fails to conduct a review and follow up in the ways described. A sunset provision is often an effective way to proceed, especially when one is embarking on a new, untried course. But here we are dealing with existing regulations and for the bulk of them, the verdict is not in -- while there are criticisms of the regulatory system, many of the regulations are sensible, effective, and generally noncontroversial. Moreover, H.R. 994 has no effect on the underlying statutes. To the extent that existing regulatory legislation obligates State, local, and tribal governments, and private companies, institutions and individuals, to take certain action or to refrain from doing certain things, these legal obligations (and attendant penalties) will continue in effect -- regardless of what happens to the implementing regulations.

Thus, while automatic termination may be viewed as a useful "hammer," it should be recognized that if an agency fails -- despite its best efforts to conduct all of these reviews, it is the regulated community, not the agency, that will be hammered.

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It will be the regulated community that will lose the certainty of reliable guidance -- the details of implementation, the specific examples, the tailored exemptions -- that implementing regulations provide, but they will still be legally obligated to comply.

* * * * *

If the object is to obtain systematic and responsible review of existing Federal regulations, H.R. 994 simply does not do it. There are other models being considered in Congress that you may want to consider. For example, Section 625 in S. 291, as it was ordered reported out of the Senate Committee on Governmental Affairs last Thursday, would establish a process for systematic review of existing major rules that appears to be reasonable. Agencies are to establish a schedule for review, and then need to complete the review within ten years, unless the review period is extended for up to an additional five years. That is an approach you may wish to consider either alone or in conjunction with an advisory committee that would help the agency think through its priorities and focus initially on the more significant regulations.

Thank you, Mr. Chairman. I am happy to answer your questions.

Mr. MCINTOSH. Thank you very much, Ms. Katzen. Let me just address some of the points that you had made, some of which I think we should take into consideration as we consider further what to do with this legislation and a possible markup. I guess your first one was on scope. You wouldn't want to narrow the scope just to regulations that have gone through notice and comment and are printed in the Federal Register, I would think, because there are many problems that end up being created by some of the written documentation that you referred to.

The one that comes to mind to me, from experience on the Competitiveness Council, is in the area of wetlands, where there was not a regulation that created a lot of the problems there, but a delineation manual that would have served the public better had it been subject to notice and comment and some of those processes. But we may need to figure out a way, in reducing the scope or narrowing the scope or focusing it on problems, to make sure that we don't create an incentive for the agencies to develop policy outside of the regulatory process.

Ms. KATZEN. And I agree, that would be most unfortunate if we encouraged agencies to use nonpublic means. The Administrative Conference had a long study to try to examine the extent to which that occurs. It is a problem, and I agree with you in that context. My response on that is that a number of these are readily identifiable. You've mentioned the wetlands ones, in the testimony that's been presented we hear what are called the horror stories.

We understand those issues. It seems to me that rather than trying to sweep the entire universe and cover all the regulations, the 23,000 is just the regulations. I mean, if you start adding the compliance manuals and whatever, then the number gets much larger. Instead of increasingly expanding the scope, we ought to take the information we have that you've heard from your constituents, that we've heard from the agencies, and examine the issue on the merits. That, I think, would be really beneficial.

That's what we're trying to do. That's where we would like your help. But to say, go out and do everything is to set in motion a process which will be lots and lots and lots of work and paper and process and, I think, very little results, particularly if I hear what the sunset laws have done in these other States.

Mr. MCINTOSH. I think those have to do with where agencies end up being reauthorized. The effort would be to redirect some of the work done at the agency level. Because the scope of the problem is so large, you can't have either a centralized review body in the executive branch or a committee of Congress to be expected to review all of those. Second, on the performance criteria, let me just mention one solution to the problem that you mentioned of litigation, would be to have performance criteria that are very clear and easily identified, whether or not they've been met.

Some of the problem ends up being when you have fairly general performance criteria, more in the nature of a legislative prescription that go out and regulate in the public interest, for example, is very vague, but sometimes necessary. So I agree with you that there are perhaps conflicting goals in the criteria, and maybe we need to examine those. And we both share the principle that per-

formance criteria are superior to the command and control approach.

And part of it is the obligation that they're written in a way that reduces litigation. On judicial review, and let me tie that in, the way you did in the written testimony, with the notion of public comment. One thing that struck me that might be an avenue to pursue, and I wanted to hear your comments on this, would be to tie the review process more into the Administrative Procedure Act, and use a regulatory process where there is notice and comment all the way through; and then have judicial review focus on whether or not the agencies met the requirements in actually undergoing a review of a regulation.

The difference in the statute would be that it's a required activity after a certain period of time, rather than a different standard for how they would implement that activity or how it would be reviewed.

Ms. KATZEN. That would be an improvement.

Mr. MCINTOSH. Finally, let me just, I guess, mention one other area—well, I'll tell you what. I'll come back with some additional questions, because I know Henry had another engagement. So let me now turn over to Mr. Waxman from California.

Mr. WAXMAN. Thank you very much, and I must thank Mr. Peterson for allowing me to ask my questions at this point, because I have to be at another hearing on Medicare and Medicaid at another part of this building. Ms. Katzen, good to see you again. We've had several rounds recently of review of existing regulations. The Bush administration conducted a comprehensive review of existing regulations under a regulatory moratorium. More recently, President Clinton called for a review of every existing regulation last month.

H.R. 994's requirement would be inordinately expensive to comply with because it mandates an exhaustive 18-point review of tens of thousands of Federal regulations. Could you estimate what the cost would be?

Ms. KATZEN. I cannot.

Mr. WAXMAN. While H.R. 994 is likely to be expensive, there's no evidence that it would provide any additional regulatory relief. Are the benefits from yet a third round of review likely to justify these tremendous costs?

Ms. KATZEN. I had been reluctant to invoke cost benefit analysis on this bill, since you know I'm a supporter of cost benefit analysis and its application in the regulatory system. I think this bill would have a great deal of difficulty, given the amount of work that would have to be done—the amount of reports, the amount of paperwork, the amount of scrutiny—for the benefits. Because, to again use regulatory parlance, I think there's a more cost-effective way of arriving at the same results, which is to focus our energies on those where we know there's problems.

Mr. WAXMAN. Well, the public comes to rely on Federal regulations. Business and individual taxpayers rely on IRS regulations when making investment decisions. Airlines and their passengers rely on FAA safety regulations when designing aircraft or booking flights. Farmers rely on pesticide regulations. Government contractors rely on procurement regulations.

The scope of this bill is so broad that it subjects all of these regulations to review and possible termination or revision. Is it wise to create so much uncertainty for those who have come to rely on these regulations?

Ms. KATZEN. Well, I think that's a very good point. I was trying to make a variation on that theme at the end of my testimony. Your reference—I mean, I think you're completely correct. Your reference to the procurement regulations is very interesting. DOD is going through a complete rewrite of the procurement regulations to make them simpler, more streamlined. That's taking a long time, even though it is on highest, highest priority, fastest, fastest track. It is still taking a long period of time.

The Department of Commerce is rewriting the Export Administration regulations to simplify and streamline so we can be able to export our goods more readily. That has taken 1½ years in the making of just getting to a notice of proposed rulemaking, which, incidentally, when it's published in the Federal Register, will be several thousand pages because it's going to be all the old regulations and all the new proposals.

And so the pages in the Federal Register, which people keep talking about, is not an accurate number or measure of regulatory activity. But that's taken this long. To do that kind of process in the time permitted is simply not feasible.

Mr. WAXMAN. Well, the Administrative Procedures Act allows somebody who's unhappy with a regulation to petition for elimination or modification. And this mechanism provides members of the public a chance to change regulations, allows the agencies to focus their review and resources on those regulations that are really causing problems. In other words, this petition process targets regulatory review where it's needed the most. Isn't this a better approach?

Ms. KATZEN. Yes. I was concerned from the earlier panel when they said that this is a way—there's no way of getting the public to identify. But the Administrative Procedure Act has a specific provision that allows someone who wants a modification or a termination of a regulation to file a petition. And there's a standard that if the agency does not act promptly, you can go to court and enforce the agency to focus on it if there's a basis for it.

So there is already a vehicle for that type of process where somebody wants to bring an issue forward.

Mr. WAXMAN. One of the aspects of this bill that concerns me is if you don't do all these reviews in a timely fashion, there's going to be an automatic termination of those regulations, after a 7-year deadline. So my understanding is that oil companies could put lead back into gasoline if EPA didn't complete its review of the regulations banning leaded gas.

Chemical companies could start manufacturing DDT again if EPA didn't complete its review of the DDT prohibition on time. Car companies could stop installing safety features such as seat belts and airbags if DOT didn't complete its review of these regulations. Companies could begin falsifying SEC reports if the SEC didn't complete its review of its antifraud regulations. And I suppose taxpayers could simply stop paying their taxes and filing their

returns if all tax regulations were abolished because the IRS couldn't complete its review.

If my understanding is correct, it seems hard for me to believe it's in the public interest to enact a hammer that could have such far-reaching consequences for human health and well-being. Mr. Chairman, I'm concerned about a lot of aspects of this bill, particularly the cost of it. I think we need to hear from CBO for cost estimates. We also need to hear from the agencies that would have to implement this legislation.

And for that reason, I'm going to submit to you a letter signed by the majority of the minority requesting, under rule II, clause (j)(1) of the Rules of the House, an additional day of hearing so that we can get the additional information that we ought to have before us in order to make an informed decision on the legislation. And I recognize in this letter that you may also want additional witnesses at that hearing.

I yield back the balance of my time.

Mr. MCINTOSH. Thank you, Mr. Waxman. Let me take your letter under advisement and see what we can do. I'm not adverse to having additional information being brought forward about this legislation. Let me now turn to Mr. Gutknecht, and see if he has any questions for Ms. Katzen.

Mr. GUTKNECHT. Thank you, Mr. Chairman. I was intrigued by your testimony, and by my score, you indicated five areas of specific rulemaking that you thought were worthwhile. But you also indicated that there are 13,000 rules promulgated every year.

Ms. KATZEN. There's roughly 5,000 final regulations in a given year. I was using the number 23,000 since 1982. I think my math is right.

Mr. GUTKNECHT. OK. But my point, I guess, is, there are thousands of rules promulgated each year. And one of the questions I really want to get at is, the President has come out and called for his own review of rules. And somehow that's not going to be a burdensome thing, but this legislation is. Now, I'm trying to differentiate—what's the difference between the two?

Ms. KATZEN. I think it will be burdensome. And the agencies have indicated that they will find it very difficult to do, but they are doing it because we are serious that it needs to be done. I think there are several different fundamental differences between the two approaches that are being used. One is that while we have a series of questions—is this obsolete; has it outlived its usefulness; is this a function that should be done not by the Federal Government, but by a State, local or tribal government; is this something which the private sector could do by itself better—we have a series of questions we've asked the agencies on these kinds of issues.

But we don't have the 18 specific criteria, all of which have to be matched, then subject to judicial review. And it's the scheme of the way it's being worked on. You don't have to do the cost benefit analysis to say, I think there's a concern with this area, this segment. I mean, it's like the Department of Commerce was able to take and identify all of the Export Administration regulations and say, OK, this body needs to be rewritten.

And what they would be saying to the President on June 1 is, this whole area needs to be streamlined, simplified, maybe flip the

presumption about export licenses in a number of areas. That would be the process they would go through. They wouldn't have the detailed statements and they wouldn't have already done a cost benefit analysis. Their own experience, their own informed judgment and the input that they have received from their stakeholders will have led them to recommend that this is where we want to focus our energy.

And they will say, these things we can do administratively, a, b, and c—and of those, a is the most important and then b and c, and we're going to get right to it—d, e, and f require legislation; and we would propose legislation to eliminate the basis for some of those. But that's, I think, a very different thing than filing a report on each regulation. I don't even know how you define a regulation for purpose of this, since regulations are part of whole programs.

DOT the other day was talking about an outward-swinging door regulation which is part of a larger regulation that relates to inward-swinging doors, and that's part of a larger regulation about going out and coming in. Now, maybe the whole regulation needs to be rethought or eliminated because maybe this is not the Federal Government needs to do. Although you have certain accidents where workers get trapped and burned, or are otherwise in serious danger, and maybe you do want to have rules that say, doors go out so that people can leave buildings.

But leaving the merits of that aside, that is something we need to consider, is it the outward egress part that's the regulation, or the inward one? It's a very strange dynamic. But our process is to say, look through the scope of the regulations you have and identify the areas where it really makes a lot of sense to go back in and review and reconsider.

Mr. GUTKNECHT. But if I hear what you're saying, what you're really saying is that the administration plan is relatively general. And your concern with this legislative plan is, it's very specific. And I would just call your attention—we've heard testimony about carrot slicers, for example, whether they have to wear gloves, according to one department, or whether they are required not to wear gloves by another department.

We heard earlier from Representative Chapman about the formaldehyde rules costing \$4 billion, or whatever the number was. How do you ever get at those, unless you have some very specific criteria? Because what I sort of hear from the administration—I think we're on the same wavelength. I think everybody is trying to get to this point. But unless you have some specific criteria laid out, I guess what I'm getting at is this.

My grandma used to say, ideas are children are brilliant when they're your own. And what we have is an administration that promulgated these rules that is now being given general guidelines from the President saying, please review these and see if they're reasonable and proper and all of this. And my sense is that the same people who made those rules think they're pretty good ideas.

And the average person out there who has to abide by these, the small businessperson or just an individual, looks at it and says, this is crazy. I mean, how can we ever get at this if we don't provide some very specific guidance from the Congress?

Ms. KATZEN. I think this is an extraordinarily important area that you're touching on. And my answer may seem not to be responsive, but I really am trying to respond to the underlying questions. What we have is a buildup over not just the last 2 years, and not even just the last 14 years, but decades now of regulations. And they're not going to be pared back or gotten rid of or reviewed in a serious way and changed overnight, unless we prioritize.

On the kinds of questions that you've talked about, I can point with some pride to an issue this year. We heard OSHA was looking at asbestos regulation for people who are remodeling houses and other buildings and they were going to be tearing out asbestos. And the question was, how does the OSHA rules compare with the EPA's rules on asbestos? Well, we brought them into the same room, we sat them around the same table and we said, reconcile; we're not going to have inconsistent regulations here.

And that is what we have been doing on our watch. That's the function of my office—in reconciling where an action of one agency is inconsistent with an action of another. We've done it in a whole variety of areas. I'd be interested in looking at the carrot slicing issue, and I've already made a note to go back. I mean, this is exactly how you do it—you find these things when you hear about them and I think you pursue them.

Now, some may say, but it's so ad hoc; how will you ever catch them? But if it's a problem, it's being raised. And the last thing, I guess, that I would say in this area is that priorities need to be set to determine this within the executive branch, but it is also Congress that has to be involved. The formaldehyde case that was cited, the land disposal hazardous waste cases that were cited, are both situations where the agency has zero discretion; where, as I understand both of those situations, it is the statutory requirements that are making the agency take the action.

And the reason we included in the preamble of the recent EPA rule on land disposal regulations—we stated, these are low-risk; this is not where we want to be regulating; we don't want to do this; this is not what we are choosing to do, but we are choosing to do it—we don't have any choice in some instances. That's where we should be looking. That's where we should be working together—to go to that statute, to have Congress say to the court—and, incidentally, it was the court that interpreted the statute in this way—you were wrong, we don't want to impose these kinds of costs.

And we could focus our resources in a way and produce, I believe, greater benefit for the American people, because those rules should not be on the books. We do not disagree.

Mr. GUTKNECHT. OK. Thank you, Mr. Chairman, I yield back.

Mr. MCINTOSH. Thank you very much, Mr. Gutknecht. Mr. Peterson, do you have any questions for Ms. Katzen?

Mr. PETERSON. Yes. Thank you, Mr. Chairman. Ms. Katzen, as I understand it, you review 800 to 900 regulations a year now in your shop.

Ms. KATZEN. Roughly 900 a year, I think was the figure for last year.

Mr. PETERSON. And I'm also told that we don't know how many regulations there are. We've tried to determine. Apparently, what

we do know is, there's 130,000 pages and 202 volumes; is that correct? But we really don't know how many regulations there are.

Ms. KATZEN. I think, yes. It's the definition of a unit. 130,000 pages is the size of the Code of Federal Regulations, which is a better proxy than the Federal Register for determining regulations. But how they break into units is hard to define.

Mr. PETERSON. And you said there was a buildup. I think that's maybe an understatement. We've gone from 104 volumes in 1970 to 202 now. I was reading your testimony and you said the President said that we're going to have a page by page review of all agency regulations now in force, and the elimination or revision of all that are outdated or otherwise in need of reform. And there's a set of criteria here—we're going to ask about whether we need them and whether private business can do it and so forth and so on.

I guess I'm concerned about, if you're doing 900 a year, how long is it going to take you to do a page by page, line by line review of every regulation?

Ms. KATZEN. Well, fortunately, I'm not the one who's doing it. It is to be done by the agencies in the first instance. They are to be presenting to the President their analysis, and we will be consulting with them when they seek our help. We'll be looking with the President at the results of that process.

Mr. PETERSON. What is the timeframe? That's what I'm interested in.

Ms. KATZEN. June 1.

Mr. PETERSON. They're going to be able to do this?

Ms. KATZEN. The agencies have been told to do this.

Mr. PETERSON. And do you think they're going to go through every line by June 1?

Ms. KATZEN. I think they're going to go through every page. That's what they were told to do.

Mr. PETERSON. You're not sure about every line, though.

Ms. KATZEN. Line by line is a tough one.

Mr. PETERSON. Why—

Ms. KATZEN. Cost benefit analysis to change one word in one line may or may not make a difference. But if the rule itself is a problem, one word may.

Mr. PETERSON. I'm curious. I don't know exactly what's going on over in the Senate, but apparently there's some bill over there to have a review that is going to be completed within 10 years, and then could be extended for another 5 years. And you apparently favor this approach?

Ms. KATZEN. Yes. I think it's now referred to as the Roth-Glenn bill. It's S. 291 and it was reported out of the Senate Governmental Affairs Committee last Thursday, 15 to nothing. It's a comprehensive bill. It's about an inch thick, and it covers a lot of the areas that were included in some of the regulatory reform legislation that was passed by the House. It did include, in addition to some of the issues that you all had touched on, a provision for an agency to put together a plan whereby it would prioritize the areas that it wanted to review.

And it would have 10 years to do so, and that could be extended for an additional 5 years. And during that period, it would look at

the various rules that it had to determine those which needed to be modified. It didn't list specific standards with the specificity that this bill did. And the chairman, Mr. Roth, had indicated a willingness to think about this approach in cooperation with an advisory committee so that there would be some additional input in structuring the priorities.

I think this is a workable approach for a long-term review.

Mr. PETERSON. So they have 10 years to set the priorities, and if they don't set them, what's the penalty?

Ms. KATZEN. Ten years to set the priorities and carry them out.

Mr. PETERSON. What are they carrying out?

Ms. KATZEN. The review of the major regulatory programs that they believe warrant the review.

Mr. PETERSON. Is there any sunset or anything that happens if they don't? I mean, is there anything like this bill in that bill over in the Senate? Is there any sunset or any penalty for them not complying with this 10-year window?

Ms. KATZEN. I'm under oath, but I still would be cautious here in that we have seen the markup of the markup. But they haven't done the complete bill. My understanding is, a sunset provision was offered at markup and did pass. I haven't seen the provisions, so I can't define with precision what the effect is.

Mr. PETERSON. Why are you in favor of something that's 10 years and against something that's 7, if it has a sunset? I guess I—

Ms. KATZEN. It's a different structure. It's a structure in which the agency sets the priorities and then proceeds through taking the most important things first.

Mr. PETERSON. So if the agency can be in charge, then it's alright; if we're in charge, it's not alright. Is that the idea, or what?

Ms. KATZEN. No, I don't think that's a fair statement. I think the specificity of the criteria, the amount of paperwork that goes into it, the option for judicial review—it's the five things that I identified as being problems with this bill. I have no problem with the objective, with a look back. And sunset may or may not make sense, depending on what happens to the underlying statute.

But I don't believe that the difference between these is 3 years. If that were the only difference, I would not be sitting here saying these things. This provision from the Senate bill, if they changed it to 7 years, I would not oppose it for that reason. That is not the basis.

Mr. PETERSON. Thank you, Mr. Chairman.

Mr. MCINTOSH. Thank you, Mr. Peterson. Mr. Ehrlich.

Mr. EHRLICH. Thank you, Mr. Chairman.

Mr. MCINTOSH. And if you have any opening statements, we can put that into that part of the record.

Mr. EHRLICH. I'll forego my opening statement. Thank you. I enjoy listening to you, and I mean that, because I think we have agreements and disagreements. But I appreciate your honesty and your forthrightness. And I was sitting here—before I get to my question, let me make a couple of observations, most of which you know. Many of us were sent here by people who are angry.

Some of us have lived experiences with regulations in the private sector. I represented small business in litigation dealing with the bureaucracy, small businesspeople, particularly, have been elected

to Congress this time. And we got a message from the people: they're tired—and some of the people are here today—and certainly the message from my folks.

It's certainly not a partisan thing. There's plenty of blame to go around. God knows, your point with respect to the last 2 years, the last 14 years, is very well taken. It's happened under Republican and Democratic administrations alike. But we were sent here this year to really do something about it, to really just say no and get a handle on this, as you well know. Also, your point with respect to the lack of discretion that some statutes give is also very well taken. So I appreciate those observations.

That being said, you have testified that the President has set the June 1 date for agencies to send him their report identifying regulations that can be modified or eliminated administratively. And I guess I have a two-pronged question for you. One, if an agency refused to eliminate an obsolete or redundant regulation, what statutory authority do you have to order that be done? And in the 2 years that you've been there, has that statutory authority been utilized?

Ms. KATZEN. I am not aware of statutory authority that I have to order an agency to eliminate a rule. Indeed, the function that my office performs in reviewing new regulations and commenting on whether they meet cost benefit standards and other principles that we have espoused is by Executive order, not by statute. Although that is the basis of some of the regulation reform legislation.

So we have not used that authority. But I would say that within the executive branch, there is a clear understanding that the President is interested in regulatory reform. He is serious. We have a Vice President who has gotten involved in reinventing government, including regulatory reform. I've sat through any number of meetings in which the Vice President has met with people from the agency and others to talk about sectors of the economy.

We saw the first product of that on March 16, when the President announced, with the Vice President standing by his side, changes in environmental regulation and changes in some FDA regulations that would ease the regulatory burden and change the way we do business in Washington. The Vice President has devoted hours, with his jacket off, shirtsleeves rolled up, understanding the issues and pushing, pushing, pushing to make sure that we're doing the most sensible regulatory system that we can.

That power, if you will, of the President and the Vice President's moral commitment, forceful insistence on this reform effort, I think, serves us better than any statutory base could. These are people who are running the agencies, who are appointed by the President, and they listen to him when he speaks.

Mr. EHRLICH. Our problem is, and you saw it in Mr. Peterson's questions, is there's such a fundamental distrust of the agencies because, quite frankly, administrations—Republicans, Democrats like—come and go, but they stay. And these people in this room stay and have to operate under those people who are always there. We come and go, and maybe if this week's bill passes, we'll go quicker.

Ms. KATZEN. That's why it's—

Mr. EHRLICH. But the fact is, there is a fundamental distrust of what the mid-level people—I give you all the credit in the world. The President and the Vice President are committed. But the real power lies with the people who are unelected and answer to no one, in our view. And that's our fundamental problem. And you see it.

Ms. KATZEN. Absolutely. And that is why, as every component of the regulatory reform effort that the President and Vice President have announced, it is not just the development of regulations, but also their implementation, because these are both essential components of the culture of the regulatory system. And it is the culture that has to change.

Mr. EHRLICH. Yes, that's—

Ms. KATZEN. The President said, and this is a paraphrase only, we have got to stop playing gotcha with good citizens who are trying to be in compliance, but who nonetheless trip up on some minor technicality. He has talked about getting to the front-line regulators, who should understand that the objective is compliance. You look for clean air, you look for clean water, and not violations.

Now, there are some people who may not be as good citizens as we would like, who stretch the law as far as they can, or who take advantage of lax systems. And they give everybody a bad name. But the answer is not to punish the good citizens. It is to craft regulations and implement them—that you go after the bad actors, but you leave the good actors with the dignity, the self-respect, the knowledge that these people can do it.

And that's part and parcel of what we're working on while we're working on the development of regulations. And I think we're beginning to see a difference. We're seeing it—they often talk about the customs service, the Main 200 example that OSHA is piloting, some pilots that EPA is putting together. And what's happening is, within the agencies, some of the people who are wedded to command and control and slap the wrist and slap the fines are now saying, wait a second; this does work better; we are able to achieve our objectives better.

And as the light goes on on top of their head, and they realize that this is a way of achieving what they want to achieve in a more sensible way, the story spreads. And we're finding, within the agencies, a fundamental change that we're helping to bring about. I don't want to overstate how quickly it's happening or how comprehensively it's occurring. But it is happening, and it's the kind of leadership that we're trying to provide that will make a difference.

Yes, you are right, the constituents, the American people are very angry and very distrustful of Government. And it is a message that we heard not just in 1994, but in 1992 as well, and are working to try to achieve that. We can't do it ourselves. I don't think you all can do it yourselves. I think we need to work together and work in an atmosphere where we're focusing on the end game, rather than trying to win points along the way.

Mr. EHRLICH. Your point is well taken. This is the last comment. I think how successful you are in changing that culture will be reflected in our weekends back in the district, our mail, our faxes to the extent less dumb things are done to our people by Federal regulators. Thank you.

Ms. KATZEN. Thank you.

Mr. MCINTOSH. Thank you, Mr. Ehrlich. Let me cover a few miscellaneous subjects and then there will be some additional questions, Ms. Katzen, if we could leave them with you for a later response. I guess the first point, the example of the regulation you mentioned where EPA indicated in the preamble they really didn't think it was a good idea because it was a low level risk.

It struck me that that might be a good example for Corrections Day, once we actually get that new process in place. And Speaker Gingrich has asked this subcommittee to help staff in that effort. So we may want to work together with you and use it as one of the early examples on how we can go forward in correcting that statutory problem. The second point, on the EPA review, how many instances have there been in the last 10, 15 years that you're aware of where an agency has responded to that type of petition and actually eliminated or changed the regulatory burden?

Ms. KATZEN. My recollection, and it's fairly spotty, is that those petitions are not frequently litigated; that petitioners will go to the agencies and if they have a solid case for modification that makes some sense, the agency will pick it up. I know that you see a lot of notices of proposed rulemakings that, when they set forth why they're beginning this rulemaking, it's because there was a petition raised to review an area or to promulgate some rule—modify some already-promulgated rule.

The number of court cases where a decision by the agency not to grant a petition are very few and far between. I think those are quite rare.

Mr. MCINTOSH. And is it the case that the courts are reluctant to make a ruling in those areas until the agency has decided one way or the other in whether to grant a petition?

Ms. KATZEN. I think in this area there may be some concern because of the resource question. Courts generally do not want to be in the position of requiring an agency to do something that it has stated it does not want to do or does not have the resources to do. But that's in a context where you do not have standards against which the court can now say, well, based on my view, this is not worded as simply and clearly as possible.

So resources aside, there is now a law that says it has to be simply and clearly worded. Therefore, you cannot decline to grant this petition. That's the difference between the structure. I mean, we're talking, really, about a night and day type administrative process here.

Mr. MCINTOSH. And I guess I submit, perhaps, would drive to a greater review by the agencies with that type of change. Let me switch gears slightly, and it's an example, I think, of what may be driving some support for this type of legislation. It also came up a little bit in the moratorium, but more in the cost benefit bills that were going through the House. The supermandate provision in the cost benefit bill, or the petition back, to apply those standards to various regulatory proceedings, you were on record then as saying, essentially, that you thought a better approach would be to go and look at each of the individual regulatory programs and try to have Congress, working with the administration, apply those standards on a case by case basis.

Is that a correct summary of your view on that?

Ms. KATZEN. Yes.

Mr. MCINTOSH. Some troubling testimony and statements have been made, particularly in the Clean Air Act by Administrator Browner, that she did not think that the Clean Air Act was a proper case for applying cost benefit and risk assessment standards, and that they would be unable to effectively administer their policies in that area with that. That's one of the acts that, if you went on a case by case basis, I think most Americans would say we have a real problem with our regulatory program.

And there are a lot of instances where, both in statute and in the regulations, there are requirements that wouldn't be justified under a cost benefit analysis. Is it the administration's position that one, we shouldn't have a supermandate and we shouldn't reopen the Clean Air Act and apply cost benefit and risk assessment principles there?

Ms. KATZEN. I know that it is the administration's position that we shouldn't have a supermandate, and that we should look at each statute that warrants review. I am unaware of Ms. Browner's testimony on the Clean Air Act. I know that there have been a couple of bills submitted to open small pieces of the Clean Air Act that she has, I understand, not opposed.

Whether a more fundamental review is something which she thinks may be less productive than Superfund reform Safe Drinking Water reform, Clean Water reform, pesticides reform—all of which we had identified early last year, or the year before that, as really needing—I'm using now the emphatic—fully justifying a look through. I'd like to do those first because we know that those are areas where changes in the statute will save hundreds of millions, if not billions of dollars.

And we'd like to begin that process. And I think it's a question of priorities. This Congress seems to have an incredible appetite for work and an ability to move through these things very quickly. So maybe if you approach the ones that we're interested in and are very eager to begin work on, you'll soon get to the next layer. And that may be where you'll be able to direct your energies.

Mr. MCINTOSH. And perhaps in the questions we submit to you for writing, we'll phrase it with greater specificity, but it would be helpful for us to know, in considering this bill and others, whether there would be support for some of those case by case reviews. And I appreciate you mentioning those where the administration has already identified it. And we may ask you to go back and seek out the views of your colleagues on some of the other programs as well.

Finally, in another area unrelated to that earlier line of questioning, we have opened up an investigation on some of the activities of the EPA on their efforts to influence the legislative process on the moratorium bill and cost benefit and risk assessment. As you're aware of, there's a general statutory provision allowing authorized methods of presenting agency and administration views and prohibiting unauthorized use of taxpayer dollars to lobby Congress.

And we don't know what has happened there, and we're trying to gather the facts before we rush to any judgment or make any statement, in terms of a conclusion under that statute. In the process of gathering those facts, are you aware of any meetings that

may have occurred either at the White House or at OMB or with White House and OMB personnel where there was a discussion of a plan to involve outside groups in influencing Congress on those two pieces of legislation?

Ms. KATZEN. I have met with a number of outside groups who have come to either clarify the White House position or seek our assistance or ask us to provide information to them. This has included business groups, public interest groups and others. The interest in what Congress has been doing is widespread, and we have received calls from any number of congressional offices looking for information, and any number of outside groups.

And I have participated in some meetings where I am trying to clarify the administration's position and give examples of what we're talking about. I don't know if that's completely responsive to your question, but I also have to say that my understanding is that Administrator Browner has said quite clearly that she believes there is no basis for the allegations that she has violated any law or that EPA has violated any law in this area, or behaved otherwise improperly.

And she, I understand, is quite emphatic on this point, and believes that it is not a well-grounded allegation or assertion.

Mr. MCINTOSH. And the subcommittee is waiting for a full response to our inquiry so that presumably the documents will back her up on that. I was also wondering, not only meetings with people outside of the administration, but were there meetings where officials from EPA met with you or other officials at the White House to discuss plans to try to engage lobbying against these bills?

Ms. KATZEN. I have no current recollection—I have no recollection of a meeting convened for that purpose or discussing those kinds of issues as I sit here. We will discuss legislative strategy—what is the administration's position—and we have been focusing on those kinds of issues. But I'm not prepared to go beyond that here.

Mr. MCINTOSH. OK. Perhaps consulting your calendar and so forth, we'll be able to make sure that that was the case. Let me just close by saying, I appreciate you coming and participating today on this hearing. I appreciate your views and would like to extend the opportunity to work with the administration as we go forward with this legislation.

I think some of the comments that you made will allow us to strengthen it if there is a decision to go forward. And there has been a request by the minority members to have additional witnesses. We'd like to coordinate with you in terms of who in the administration might be appropriate to testify if we have an additional hearing date.

So thank you very much for coming, and we look forward to working with you.

Ms. KATZEN. Thank you.

Mr. MCINTOSH. Let me call forward the next panel, and then we'll take a break for lunch after Mr. Schaerr's testimony.

Mr. SCHAERR. So, I'm all by myself this morning, huh?

Mr. MCINTOSH. Yes, that's right. Let me first say, it's an honor to have you here, Mr. Schaerr. I was privileged to be able to work

with you when I served in the administration with Vice President Quayle. And it was because of your work in leading the staff work on the moratorium and review that President Bush put into place in 1992 that I wanted to have you come forward today and discuss with us your experiences there.

You are an expert in many of these regulatory areas, and I think the committee will be well served.

[Witness sworn.]

Mr. McINTOSH. Mr. Schaerr, thank you for coming, and please share with us your views on this legislation.

Mr. SCHAEER. Thank you, Mr. Chairman. I put together some written testimony, which I request be inserted into the record.

Mr. McINTOSH. It will.

STATEMENT OF GENE SCHAEER, PARTNER, SIDLEY & AUSTIN

Mr. SCHAEER. As you mentioned, my name is Gene Schaerr. During the Bush administration, I served as Associate Counsel of the President, with responsibility for issues of regulatory law and policy; and in that capacity, had many opportunities to work with the chairman on similar issues. I'm currently a partner in the DC office of Sidley & Austin, where I specialize in appellate and regulatory matters.

I think the best way to reduce the enormous regulatory tax that has been discussed before and, indeed, the best way to change the regulatory culture that Ms. Katzen referred to earlier is to enact a mechanism something like that in H.R. 994. In my written testimony, I suggested an analogy which I think captures the reason why such a mechanism is so important, and that is an analogy from the human body.

We all know that our bodies need kidneys in order to remove waste and impurities from our bloodstream and elsewhere. And in the same way, I think, any regulatory system needs some kind of a mechanism that systematically reviews and abolishes outdated or unnecessary requirements. Otherwise, the regulatory system and the economy, like the human body, will be in big trouble.

And many of us in this room have had experience with sort of ad hoc, one shot regulatory reviews. And although those can be useful and helpful, they are no substitute for having kidneys. Obviously, the same is true of Federal spending. Without some kind of controls, without a regular review process for Federal spending, it will clearly spiral out of control to a greater extent than it already has. The key difference, in my view, between the spending process and the regulatory process is that the spending process has at least one kidney, and that is the budget and appropriations process. Now, that process might not always produce the right decisions, but it at least forces Congress and the executive branch to confront, on a regular basis, the question of whether spending programs are worth their cost. But there is no corresponding system for regulation.

Several times today we've heard people express a fear that this comprehensive review of regulations over a 7-year period would simply be too burdensome. Well obviously, in the budget process, there's a more or less comprehensive review of spending programs that occurs much more frequently than that. And I dare say that

there are probably as many spending programs as there are regulations in the government.

I find it very surprising that there is not already a mechanism for weeding out the fat and the waste in the regulatory system. To pursue the spending analogy a little further, imagine the outcry if an agency asked for a blank check from the Treasury to implement some statute, and requested that it be given blanket authorization to spend as much money as it wanted in implementing that statute, and with no periodic determination, either by the agency or by Congress, whether the expenditures made any sense at all.

Well, in the regulatory arena, that is exactly what agencies can do with private resources. As we know, regulations have the same affect as a tax on private companies and individuals who have to comply with them. And there's simply no check on that power that's similar to the budget and appropriations process. I think this is one of the key reasons why the overall cost of regulation has become so staggering, and one of the reasons why the very word, regulation, has become a dirty word in politics, at least outside the beltway.

So I think I gather from this conversation today, or this hearing today, that everyone seems to agree on the need for some kind of a review and sunset mechanism. And the real question is, why should Congress impose that mechanism? Why not just leave it to the executive branch to do on an ad hoc basis? Here, again, I think the appropriations process is the right analogy. I don't think anybody in Congress would seriously consider approving a President's budget as submitted, even if a majority of Congress were from the President's party.

Part of the reason for that is that, as representatives of the people, you in Congress correctly believe and understand that you have an independent responsibility to protect the interests of the taxpayers who have to foot the bill for any agency's programs. Well, that is no less true of those who have to incur the cost of complying with an agency's regulations. After all, as many people have said today, it's Congress that delegated the authority to the agencies to regulate in the first place.

In my testimony, I've suggested three respects in which I would expand on H.R. 994. One is that I would reduce the review period. I would not increase the review period for existing regulations, but I would reduce it to 3 years. If the administration can do a comprehensive review in 3 or 4 months, certainly it can do a review in 3 years. As I explain in my written comments, I would also require that agencies not only consider, but also actually apply a cost benefit standard when they review their regulations.

The chief difficulty that I have with H.R. 994 as written is that it lists 18 factors, but without actually requiring that the agency apply any of those factors. It simply has to consider them. I would set out a cost benefit standard and then let the agency consider the remaining factors as factors to be considered in determining whether the cost benefit standard has been met.

And finally, I would extend H.R. 994 to statutes and not just regulations. Thanks for the opportunity to testify. And I'd be happy to answer any questions.

[The prepared statement of Mr. Schaerr follows:]

TESTIMONY OF GENE SCHAEER

Partner, Sidley & Austin¹

Before the Subcommittee on National Economic Growth,
Natural Resources, And Regulatory Affairs

March 28, 1995

Good morning, Mr. Chairman and Members of the Subcommittee. My name is Gene Schaerr, and I am a partner in the law firm of Sidley & Austin, where I practice appellate and regulatory law. During the Bush Administration, I served as Associate Counsel to the President, with responsibility for issues of regulatory law and policy.

In my view, enacting a review and sunseting mechanism such as that contained in H.R. 994 is one of the most important things Congress could do to reduce the \$500-billion-a-year "hidden tax" that our federal regulatory system imposes on the private sector. Just as the human body needs kidneys to remove waste and impurities, so too the regulatory system needs a mechanism that systematically reviews and excises outdated or unnecessary requirements. Without such a mechanism, our national economy will continue to be less healthy than it could be, just as the human body would be in big trouble without its kidneys.

In this respect, regulation is similar to federal spending. The difference is that the latter at least has one kidney -- the budget and appropriations process. It may not always produce the right decisions. But it does force Congress and the executive branch to confront, on a regular basis, the question whether particular spending programs are worth their cost. There is no corresponding system for regulation.

This is remarkable to me. Imagine the outcry if an agency asked for authorization to spend as much public money as it wanted in implementing a particular statute, with no periodic determination, by the agency or Congress, of whether the expenditures made sense. Yet, in the regulatory arena, that is exactly what agencies are currently allowed to do with private resources. There is no mechanism that forces federal agencies to determine, on a regular basis, whether the half trillion dollars the private sector spends complying with regulations is wasted or well spent.

This is undoubtedly one reason why the overall costs of regulation have become so immense. It is also one reason why the mere mention of "federal regulation" draws jeers and hisses from people outside the Beltway.

Having established the need for such a sunset mechanism, perhaps the next question is: Why should Congress impose a sunset requirement on the agencies? Why not leave this to the executive branch?

Here again, I think the appropriations process provides the appropriate analogy. I doubt there is anyone in Congress who would seriously consider approving a President's budget as submitted (even if a majority were members of his party). As representatives of the people, you

¹ The views expressed here are solely those of the witness, and do not necessarily reflect the views of Sidley & Austin or any of its clients.

correctly believe you have an independent responsibility to protect the interests of the taxpayers who must foot the bill for an agency's programs. But that is no less true of those who incur the costs of complying with an agency's regulations. After all, it is Congress that delegated to the agency its authority to regulate in the first place.

For all these reasons, I support H.R. 994. But I would also expand upon it in three ways.

First, I would not treat existing regulations more leniently than new ones. Almost by definition, older regulations are more likely to be outdated than newer ones, and therefore may need to be reviewed even more quickly. But I would certainly not allow them to go unreviewed beyond the three-year period applicable to new regulations.

Second, I would clearly require that agencies not only consider, but also apply, a specific cost-benefit standard in reviewing their regulations. Without such a standard, an agency could simply pay lip service to each of eighteen factors described in Section 4(b), and then reach whatever decision the agency wants. Indeed, under the current version of H.R. 994, I believe courts exercising judicial review would effectively be barred from examining the agency's decision on the merits. They would be limited to procedural issues such as whether the agency complied with relevant time limits and whether it mentioned all of the specified factors in its decision.

This problem is easily solved. Section 4(b) could be modified to specify that an agency may retain only those regulations that satisfy two basic criteria. The first, which is alluded to in Section 4(b)(9), is that the regulation be likely to maximize the "net benefits" to society -- i.e., the benefits less the costs. The second, which is mentioned in Section 4(b)(4), is that those benefits actually exceed the costs, so that the regulation is doing more good than harm. In my view, any sound regulation must satisfy these two basic conditions; it is not enough that the agency merely consider these conditions in reaching its decision. The remaining sixteen criteria can and should be retained as factors for the agency to consider in determining whether these two basic cost-benefit requirements are satisfied.

I admit that this modification would create the kind of "super-mandate" that has recently proven controversial in the Senate. That issue could be averted here, however, by requiring the agency to adhere to these two cost-benefit criteria only to the extent allowed by the underlying statute. I do not recommend this course, but I think it would be a much better compromise than failing to impose any cost-benefit standard at all.

Third, I would apply the principles of H.R. 994 to statutes as well as regulations. In many cases, much of the problem is the statute itself, not just the agency's implementation. I am sure those in this room could identify countless regulatory statutes that likely would never be retained if a legislative sunset were already in effect. I will mention only two.

One is the Glass-Steagall Act, which attempts, among other things, to separate commercial from investment banking. There seems to be a growing consensus that this statute

is outmoded and unnecessary, and I doubt it would still be on the books if a sunset provision were in effect today.

Another is the Public Utility Holding Company Act, which the electric utility industry affectionately calls "puke-a." That statute was passed some sixty years ago to address a fear of concentration. But today its principal effect, in my view, is to prevent a small slice of the industry from exploring new competitive opportunities in such areas as cable television and local telephone service.

Whether or not these statutes should be repealed -- and I am not here today to present or advocate a position on the issue -- it is clear to me that they, and many like them, would not even be at issue today if Congress had had the wisdom to enact a legislative sunset requirement ten, twenty, or thirty years ago. I hope you will not let this opportunity pass.

In sum, I believe H.R. 994 represents a very useful step toward more responsible regulation. It could be even more useful with some modest modifications.

Thank you for the opportunity to testify today. I'll be happy to answer any questions you have.

Mr. MCINTOSH. Thank you very much. I appreciate you coming here today and sharing those insights with us. Let me pursue that last point. In terms of applying a sunset to statutes, were you thinking in terms of saying, X would expire after 3 or 7 years, or that if there was a regulation that was required and it would expire, that the underlying statute would remain in effect, but there wouldn't be the statutory mandate to issue the regulation?

Mr. SCHAEER. Well, I have some difficulty with having statutes on the books that purport to require something and then having a whole host of exemptions. I would prefer just to see the statute expire if there's no reason for the regulation that the statute requires.

Mr. MCINTOSH. Let me ask your opinion of the judicial review mechanism in the statute and also, perhaps, reflecting upon Ms. Katzen's comments that it was unnecessary and an unwise move for this committee to consider. What's your view of judicial review of the sunset decision—review decision made as part of the sunset process?

Mr. SCHAEER. Well, I guess my view of the judicial review provision flows from my view of what the chief problem is with H.R. 994, which is the absence of a clear standard that agencies have to apply. My own view, which I admit differs from Ms. Katzen's, my own view is that most courts trying to review an agency's decision under H.R. 994 would simply look at the list of 18 criteria and they would say, really, all this requires the agency to do is simply to address each of these criteria.

It doesn't require them to reach any conclusions under those criteria. And I think most courts would probably conclude that what the agency decides is totally within the agency's discretion, and would say, our review is really limited to procedural matters like whether the time limits were complied with and whether the agency touched all of the 18 bases in its decision, but without really examining its analysis to see whether it's at all reasonable or supported by the evidence.

Mr. MCINTOSH. So I guess, let me step back and say, based on your recommendation there, the second point, would you be recommending we essentially create a system that, periodically, every 3 years, would require the agencies to, for existing regulations, go through the cost benefit provisions that Congress considered earlier in I think it was H.R. 1022, and reapply those to existing regulations, with the presumption being that if that weren't done or they didn't meet the justifications, then the regulation would no longer be in effect?

Mr. SCHAEER. Yes.

Mr. MCINTOSH. OK. Let me ask another question for you on a different line. From your experience in administering the moratorium and review by the agencies that President Bush put into place in 1992, were there certain areas where, without statutory authorization, the President was impeded or at least felt constrained in going forward in that type of review?

Mr. SCHAEER. Sure, there are lots of those. There are other situations, as Ms. Katzen mentioned, where even though the statute itself does not appear to require a regulation, the courts for one reason or another have forced the agency to do it. My own experience

is that in the majority of instances where a regulation is unreasonable, the agency, if it looks hard enough and is willing to think about it hard enough, can find a way to either avoid the regulatory requirement or to make it much less burdensome, so that it's not such a problem for the industry.

Mr. MCINTOSH. Thank you very much, Mr. Schaerr, for coming and speaking with us. Mr. Gutknecht, do you have any questions for Mr. Schaerr.

Mr. GUTKNECHT. No, thank you.

Mr. MCINTOSH. I appreciate that. And if any additional questions come up, we may contact you and I will request that the record be kept open if there are additional matters that we may seek your advice and input on.

Mr. SCHAERR. Sure. Thank you.

Mr. MCINTOSH. I'm advised by the staff that rather than breaking for lunch, it would be better if we proceeded on to the rest of the panels; that some people who have traveled from out of town have to catch flights. And so I think we'll do that and allow our stomachs to grumble if that becomes a problem.

So let me call forward the next panel of witnesses. This panel is comprised of several citizens who are going to give us their view of some of the problems under the current regulatory system. Mr. Charles Bechtel of the Harold Becker Roofing and Sheet Metal Co.; Mrs. Kaye Whitehead, owner/operator of Seldom Rest Farms, a friend and constituent of mine from Muncie, IN—delighted to have you here, Kaye; Mr. Steven Dean, president of Dean Lumber Co.; Mr. Joe Bob Burgin, owner of Joe Bob's Store, Inc.; and Mr. Paul Mashburn of Viking Builders, Inc.

[The panel was sworn.]

Mr. MCINTOSH. Let me first call upon Mr. Bechtel. If you could share with us your views of this proposed legislation.

STATEMENTS OF CHARLES BECHTEL, CEO, HAROLD J. BECKER ROOFING AND SHEET METAL CO.; KAYE WHITEHEAD, OWNER/OPERATOR, SELDOM REST FARMS; STEVEN DEAN, PRESIDENT, DEAN LUMBER CO.; JOE BOB BURGIN, OWNER JOE BOB'S STORE, INC.; AND PAUL MASHBURN, VIKING BUILDERS, INC.

Mr. BECHTEL. Mr. McIntosh and members of the committee, thank you for the opportunity. Mr. Chairman, members of the subcommittee, my name is Charles L. Bechtel. I'm the owner and chief executive officer of the Harold J. Becker Co., Inc., in Dayton, OH. I am testifying today as president of the National Roofing Contractors Association. I am also testifying on behalf of the Associated Specialty Contractors Association.

I appreciate the opportunity to comment on the Regulatory Sunset and Review Act of 1995, H.R. 994, that would terminate existing Federal regulations after 7 years, and newly enacted regulations after 3 years, pending reauthorization of the appropriate agency. NRCA applauds the subcommittee's decision to hold hearings on this timely issue.

Establishing a thorough regulatory review process is a crucial step toward removing the stranglehold that overregulation has on economic growth in this country. Mr. Chairman, I would like to

submit my written statement for the record, and summarize my comments beginning with the text you will find on page 3. In February 1992, then-President of NRCA, Richard Rosenow of Hans Rosenow Roofing Co. in Elk Grove Village, IL, wrote an op-ed piece for the Wall Street Journal entitled, "So You Want to Get Your Roof Fixed?"

I've attached the article, which accurately describes regulatory dilemma that face my colleagues in the roofing industry. In 1994, I asked NRCA staff to annotate "So You Want to Get Your Roof Fixed?" which I have also attached, to see whether the regulations cited in the original had been eased. We slightly altered the story to feature a school building, as opposed to the neighbor's garage. But the regulation from the original remained applicable.

As the current president of NRCA, I regret to tell you that this exercise has demonstrated that Federal regulations are still growing unchecked. For example, OSHA is pursuing new regulations on reporting illnesses and injuries, hazard abatement notification and indoor air quality. It is continuing to promulgate its lead standard, and a massive regulatory proposal concerning ergonomics.

In February this year, OSHA finalized an excessive new fall protection standard that requires, among other things, that all openings more than 2 inches in any dimension be covered with a color-coded barrier labeled, "hole." In addition, there are also many new regulations from the Department of Transportation, Department of Labor, EPA and various other agencies and commissions. Furthermore, there are countless State and local regulations.

The impact of Government regulation on my business, and indeed on all construction contracting companies, is staggering. Taken one at a time, the regulations I must contend with might not seem so onerous. But when they are taken as a whole, then I must be an expert in OSHA regulations, in EPA regulations, in DOT regulations, in labor law, in Federal procurement and bidding procedures, while I try to keep my workers employed in a very difficult construction economy.

Mr. Chairman, you may now turn to page 6, where I will continue my oral statement. OSHA's asbestos standard illustrates the failings of the current agency review process involving Office of Information and Regulatory Affairs, OIRA. There has been so much rhetoric about the new administration's willingness to work with small business in streamlining regulations. Executive Order 12866 would have been a step in the right direction if it had actually restored the integrity of centralized review.

With regard to OSHA's final asbestos regulation, OMB and OIRA had the perfect opportunity to do the right thing. However, OMB and OIRA's inability to implement its mission became evident when a discrepancy arose between the EPA interpretive rule on asbestos and OSHA's asbestos regulations governing work practices and material handling, worker training, et cetera.

In essence, roofing contractors faced being in total compliance with the EPA's regulation and simultaneously in violation of the OSHA regulation. In an attempt to settle the problem, NRCA met with OIRA Administrator Sally Katzen and asked that OMB and OIRA see to it that the regulations that came out were consistent and reasonable. Unfortunately for the many roofing contractors at

risk of violating Federal law, OIRA chose not to harmonize the two regulations.

OIRA and OMB are mandated to resolve regulatory discrepancies, much as the one I just mentioned; but in practice, have done little, if anything, to alleviate the problem. This is precisely why, Mr. Chairman, the Regulatory Sunset and Review Act of 1995 is crucial in the development of effective agency review practices. By sunseting regulations and forcing agencies to periodically evaluate them, this legislative mandate would terminate outmoded and misguided regulations and prevent overzealous regulators from promulgating unnecessary layers of regulations.

Mr. Chairman, as a small businessman, I commend your efforts to eliminate the burdens that Federal regulations place on the business community. H.R. 994 would impose a more disciplined, enforceable regimen of review requirements for Federal agencies than that which now exists. The subcommittee's focus on the need to establish an effective review process for regulations is a logical step toward strengthening the weaker language contained in the Regulatory Flexibility Act of 1980.

An often overlooked portion of the Reg Flex was the congressional requirement that agencies review their regulations every 10 years. Although agencies have historically ignored this legislative requirement, the 104th Congress is now uniquely positioned to install a sunset mechanism which would effectively enforce agencies to comply with the review process.

NRCA strongly supports H.R. 994. I appreciate the opportunity to be here today, and will be happy to answer your questions.

[The prepared statement of Mr. Bechtel follows:]



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STATEMENT BY
CHARLES L. BECHTEL, PRESIDENT
OF THE
NATIONAL ROOFING CONTRACTORS ASSOCIATION (NRCA)
BEFORE THE
SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH, NATURAL
RESOURCES AND REGULATORY AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
CONCERNING THE
THE REGULATORY SUNSET AND REVIEW ACT OF 1995
MARCH 28, 1995

Mr. Chairman and Members of the Subcommittee, my name is Charles L. Bechtel and I am the owner and chief executive officer of the Harold J. Becker Co., Inc., a roofing company in Dayton, Ohio. I am testifying today as President of the National Roofing Contractors Association (NRCA), and I am also testifying on behalf of the Associated Specialty Contractors (ASC)*, a federation of eight national contractor associations with a combined membership of 26,000 contracting firms.

NRCA is an association of roofing, roof deck and waterproofing contractors. Founded in 1886, it is one of the oldest associations in the construction industry and has over 3,700 members represented in all 50 states. Every one of those members is a small, privately held company; our average member, in fact, employs 35 people and has annual sales of just over \$3 million per year.

I appreciate the opportunity to comment on the Regulatory Sunset and Review Act of 1995, H.R. 994, that would terminate existing federal regulations after seven years and newly enacted regulations after three years pending reauthorization by the appropriate agency. NRCA applauds the Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs' decision to hold hearings on this timely issue. Establishing a thorough regulatory review process is a crucial step toward removing the strangle hold that overregulation has on economic growth in this country.

LOOKING BACK AT REGULATORY REVIEW

Mr. Chairman, NRCA strongly endorses H.R. 994, which would require agencies to review the specific impact that federal regulations have on the economy. Federal regulations cost the U.S. economy an estimated \$500 billion annually. Clearly, a solid system of regulatory checks and balances is essential.

Every recent U.S. president has had some means of high-level review of regulations. Richard Nixon called it the Quality of Life Review, which had its focus on environmental, consumer protection and health and safety regulations. Gerald Ford created the Council on Wage and Price Stability in 1974, in response to complaints that overregulation was to blame for escalating prices. Jimmy Carter appointed a Regulatory Analysis Review Group to look at the most significant rulemakings. In addition, Carter signed the Paperwork Reduction Act, which created the Office of Information and Regulatory Affairs (OIRA) as a division of the Office of Management and Budget (OMB).

The Paperwork Reduction Act provided Ronald Reagan with a deregulatory vehicle, and he issued Executive Order 12291, which required cost-benefit analyses of regulations and a centralized review of all pending rules. Mr. Chairman, as you know better than most, George Bush appointed the Council on Competitiveness, headed by Dan Quayle. In 1992,

Bush issued a moratorium on all regulations without stated statutory deadlines, and the moratorium remained in effect until Bill Clinton took office.

On September 30, 1993, Clinton signed Executive Order 12866, modifying the procedures that executive branch agencies use in reviewing regulations and eliminating the Council on Competitiveness. Executive Order 12866 requires that prior to adopting regulations, agencies must perform two separate analyses. First, they must demonstrate that the benefits of the regulatory objective outweigh the cost of the regulation. Second, they must develop the most cost-effective means of achieving those regulatory goals. Executive Order 12866 also confirms that the regulatory review of "significant" regulations is now centralized at OMB, within OIRA. The OIRA review process is supposed to make sure that regulations are effective, consistent, sensible and understandable. OIRA is also charged with the responsibility of reconciling (harmonizing) regulations from different agencies, such as the Occupational Safety and Health Administration (OSHA) and Environmental Protection Agency (EPA), concerning the same subject matter. For example, both EPA and OSHA have recently promulgated regulations for the handling of asbestos-containing materials.

Unfortunately, the most recent incarnation of executive branch efforts to inject strength into the regulatory review process and eliminate agency overlaps has been ineffective. As the following examples will show, H.R. 994's provisions for sunseting new and old regulations are sorely needed.

SO YOU WANT TO GET YOUR ROOF FIXED...

In February 1992, then president of NRCA, Richard Rosenow of Hans Rosenow Roofing Company in Elk Grove Village, Illinois, wrote an op-ed piece for The Wall Street Journal, entitled *So You Want To Get Your Roof Fixed...* I have attached the article, which accurately described the regulatory dilemma that faced my colleagues in the roofing industry. In 1994, I asked NRCA staff to annotate *So You Want To Get Your Roof Fixed...*, which I have also attached, to see whether the regulations cited in the original had been eased. We slightly altered the story to feature a school building, as opposed to a neighbor's garage, but the regulations from the original remain applicable. As the current president of NRCA, I regret to tell you that this exercise has demonstrated that federal regulations are still growing unchecked.

For example, OSHA is pursuing new regulations on reporting illnesses and injuries, hazard abatement notification and indoor air quality. It is continuing to promulgate its lead standard and a massive regulatory proposal concerning "ergonomics." In February of this year, OSHA finalized an excessive new Fall Protection Standard that requires, among other things, that all openings more than two inches in any dimension be covered with a color-coded barrier labeled "HOLE." In addition, there are also many new regulations from the Department of Transportation (DOT), Department of Labor (DOL), EPA, and various other agencies and commissions. Furthermore, there are countless state and local regulations.

The impact of government regulations on my business, and indeed on all construction contracting companies, is staggering. Taken one at a time, the regulations I must contend with might not seem so onerous. But when they are taken as a whole, then I must be an expert in OSHA regulations, in EPA regulations, in DOT regulations, in labor law, in federal procurement and bidding procedures -- while I try to keep my workers employed in a very difficult construction economy.

HAZ-COM: THE REALITY

Let me give you one example of a regulation that is seven years old and would be subject to H.R. 994. I bring this particular regulation to your attention because I believe that the roofing industry would benefit from H.R. 994's sunset and review provisions in this case.

One of the most egregious regulatory burdens placed on the roofing industry today is OSHA's Hazard Communication Standard, or Haz-Com. Haz-Com was originally promulgated back in 1983 for the manufacturing sector. It has since been expanded to cover all industries in America. In 1987, OSHA expanded Haz-Com to include construction. The standard requires employers to assess chemical hazards in the workplace; write a policy for the safe handling of these materials including a complete inventory; and provide information and training to exposed employees.

The cornerstone of this training is the Material Safety Data Sheet, or MSDS. The MSDS will tell you everything you could want to know about a hazardous material including the manufacturer's name and address; ingredients; physical characteristics; flammability; reactivity; potential health hazards; precautions for safe handling; and required personal protective equipment.

Mr. Chairman, Haz-Com is confusing, expensive, and has done little to improve safety within the construction industry. Let me point out, that I must have MSDSs at every job site for all hazardous materials, and I am expected to know which of these products are in use at all job sites, on any given day, and make sure the correct MSDS is available on site. Moreover, in 1994, Haz-Com violations represented nine of the top twenty most frequently cited OSHA standard violations -- a fact my colleagues and I firmly believe to be a direct result of pressure on OSHA compliance officers to write a certain number of citations per inspection. Haz-Com violations are the easiest violations to identify because 100 percent compliance is impossible.

Mr. Chairman, perhaps the Administration will tell you that H.R. 994 is not necessary because an agency can periodically reopen the public record for comments on a regulation, sometimes for prolonged periods of time. In fact, a modified final Haz-Com standard was printed in the February 9, 1994 *Federal Register* after OSHA reopened the public record for comments.

Haz-Com was supposed to provide a single reference source for employers and employees in the event of an emergency involving dangerous substances, but, in fact, it is the last place that they would look--Haz-Com has given us thousands of MSDSs on everything from "air" to Joy dishwashing detergent. Despite the proliferation of paperwork, and the fact that the standard is the most frequently cited by OSHA inspectors (a roofing contractor in Indiana was cited for not having an MSDS for caulk), the modified final Haz-Com rule makes minor changes that can be found only with the help of a magnifying glass. Clearly, the Haz-Com example demonstrates the need for the sunset and review provisions found in H.R. 994.

OSHA'S OLD/NEW ASBESTOS STANDARD

Another example of the need for H.R. 994 is OSHA's new asbestos standard, which went into effect on October 11, 1994. This standard would have been subject to H.R. 994's sunset and review provisions because it had been in effect since 1986. If OSHA had to comply with H.R. 994, and either terminate or reauthorize its asbestos standard, the result might have been far different than the unreasonable regulation that was issued in 1994.

Asbestos Containing Roofing Materials (ACRM) are present, normally in very small amounts, in an estimated 90 percent of all homes and 58 percent of all buildings in the U.S. today. In the overwhelming majority of these cases, ACRM is present in roof coatings, cements, mastics and base flashings where the asbestos fibers are fully encapsulated in a bituminous or resinous binder.

Despite the EPA and the Consumer Protection Agency's conclusion that there is no likelihood of fiber release from these materials as they are handled in roofing work, OSHA imposed this onerous standard on all ACRM removals. NRCA estimated that compliance with OSHA's new rules would almost double both the cost and the duration of roofing jobs subject to the standard.

In 1991, OSHA issued a Notice of Proposed Rulemaking for this new standard. OSHA hired CONSAD, a favorite consulting firm of the agency, to conduct its economic impact analysis. CONSAD concluded that the annual incremental cost per affected firm would be \$324, and the annual incremental cost per affected worker would be \$135.

NRCA conducted its own review, based on the CONSAD report, which demonstrated that OSHA had substantially underestimated the total per worker and per firm costs of its new standard. If OSHA's errors had been corrected to show real costs, the impact on the projected bottom line for roofing would have been huge--annual compliance costs would have been approximately \$1.3 billion! OSHA's per worker and per firm costs of \$135 and \$324 were also grossly underestimated. NRCA projected that the average annual cost would have been approximately \$7,759 per worker and \$47,515 per firm. This increase in per firm costs could have easily erased the profit margin of small- and medium-size roofing firms.

Why was there such an incredible discrepancy between OSHA's figures and NRCA's estimates? In short, OSHA's Regulatory Impact Analysis reflected major omissions. For example, OSHA cost figures only took into consideration Built-up Roofing (BUR) removal. By covering only BUR removals and repairs, OSHA had failed to cover the vast majority of roof removal and repair jobs. NRCA estimated that removals of asbestos-containing BUR constituted less than 12 percent of all roof removal jobs.

At great expense, NRCA pursued judicial review of the standard, and our message to OSHA was simple: roofing workers could be fully protected against significant health risks in ACRM work by a regulation, like EPA's, which (1) tightly focused on only those relatively few jobs where significant fiber release was even possible, and (2) imposed common-sense work practice controls that were within the capabilities of typical roofing contractors.

Requiring OSHA to comply with a congressionally mandated review process, as envisioned in H.R. 994, would go a long way to preventing arbitrary and burdensome regulations, such as the asbestos standard, from adversely impacting roofing companies and other small businesses in the future.

THE PERFECT OPPORTUNITY TO DO THE RIGHT THING

OSHA's asbestos standard illustrates the failings of the current agency review process involving OIRA. There has been much rhetoric about the new administration's willingness to work with small business in streamlining regulations. Executive Order 12866 would have been a step in the right direction, if it had actually restored the integrity of centralized review. With regard to OSHA's final asbestos regulation, OMB and OIRA had the perfect opportunity to do the right thing.

However, OMB and OIRA's inability to implement its mission became evident when a discrepancy arose between the EPA Interpretive Rule on asbestos (National Emission Standards for Hazardous Air Pollutants for Asbestos, "Asbestos NESHAP") and OSHA's asbestos regulations governing work practices, material handling, worker training, etc. In essence, roofing contractors faced being in total compliance with the EPA's regulation and simultaneously in violation of the OSHA regulation. In an attempt to settle the problem, NRCA met with OIRA Administrator Sally Katzen and asked that OMB and OIRA see to it that the regulations were consistent and reasonable. Unfortunately, for the many roofing contractors at risk of violating federal law, OIRA chose not to harmonize the two regulations.

CONGRESS RESPONDS

OIRA and OMB are mandated to resolve regulatory discrepancies, such as the one I just mentioned, but in practice have done little, if anything, to alleviate the problem. This is precisely why, Mr. Chairman, the Regulatory Sunset and Review Act of 1995 is crucial in the development of effective agency review practices. By sunseting regulations and forcing

agencies to periodically reevaluate them, this legislative mandate would terminate outmoded and misguided regulations, and prevent over-zealous regulators from promulgating unnecessary layers of regulations.

Mr. Chairman, as a small businessman, I commend your efforts to eliminate the burdens that federal regulations place on the business community. H.R. 994 would impose a more disciplined and enforceable regimen of review requirements for federal agencies than that which now exists.

The subcommittee's focus on the need to establish an effective review process for regulations is a logical step toward strengthening the weaker language contained in the Regulatory Flexibility Act of 1980 (Reg Flex). An often overlooked portion of Reg Flex was the congressional requirement that agencies review their regulations every ten years. Although agencies have historically ignored this legislative requirement, the 104th Congress is now uniquely positioned to install a sunset mechanism which would effectively force agencies to comply with the review process. NRCA strongly supports H.R. 994.

I appreciate the opportunity to be here today and will be happy to answer your questions.

* Members of the Associated Specialty Contractors: Mason Contractors Association of America; Mechanical Contractors Association of America; National Association of Plumbing-Heating-Cooling Contractors; National Electrical Contractors Association; National Insulation Association; National Roofing Contractors Association; Painting and Decorating Contractors of America; Sheet Metal and Air Conditioning Contractors National Association.

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So You Want to Get Your Roof Fixed . . .

By RICHARD ROSENOW

Suppose you own a roofing business, and one morning you get a call from your neighbor, whose garage roof is leaking. He tells you that the roof is asphalt-based, and you agree to send a repair crew to try to fix it. In order to fully comply with federal regulations that are in effect today, you would have to:

First examine the roof to determine whether asbestos is present. There is a good chance that an asphalt roof will at least include asbestos-containing base flashings and cements; if they do, Environmental Protection Agency regulations will apply, and Occupational Safety and Health Agency regulations may apply.

It is very likely that you won't know from a visual examination whether asbestos is present. In that case, you will have to cut a sample from the roof, and patch it to avoid leaks at the point of the sample cut. You will then send the sample, after you have bagged it properly, to an accredited laboratory, and delay your repair work until the sample is analyzed. (In some states, only a certified abatement contractor is allowed to make this test cut.)

If you discover that asbestos is contained in the roof, you must:

Notify the owner (your neighbor) in writing;

notify the EPA Regional Office (10 days prior to beginning work, which will mean your neighbor's roof will continue to leak);

be sure that at least one person on your repair crew is trained to satisfy EPA requirements;

conduct air monitoring on the job, once you are able to start work, to determine whether emissions of asbestos will exceed

OSHA's action level. You can't do this, of course, until the 10-day EPA notification period has passed.

Once you begin any repair work, you will have to "adequately wet" the materials. EPA defines this as "thoroughly penetrating" the asbestos-containing material, which is an interesting concept for a waterproof material like asphalt. EPA also stipulates that there be no "visible emissions" on the job, even if you can demonstrate that the emissions contain no asbestos fibers.

You will then have to vacuum the dust generated by any "cutting" that you do, put it in double bags, and take it to an approved landfill.

You will also be responsible for prohibiting smoking on the job site, and are subject to fine if one of your employees lights up.

You will probably wonder why your neighbor will be asked to absorb all of the costs associated with these steps, since hundreds of test samples have shown no asbestos exposures above acceptable limits in roofing operations.

You must ensure that your crew is trained about any hazardous materials that they may encounter. (These will include the gasoline you use to power the pump on your roofing kettle.) You will also have to be sure that copies of the appropriate Material Safety Data Sheets are present at the work site, and that all containers are properly labeled.

Your crew must also be thoroughly trained in handling these materials. This will be determined not by what steps you have taken to train them, but by what your employees tell the OSHA inspector who asks them what they have been taught.

Because you are transporting asphalt

at a temperature above 212 degrees, so that your crew won't have to wait two or three hours at your neighbor's home for the asphalt to heat, you must:

Mark the side of your roofing kettle with a sticker that says "HOT" in capital letters;

complete shipping papers before the truck leaves your yard.

Have emergency response procedures developed in the event the kettle should turn over en route to your neighbor's home.

be sure that your driver has been drug tested, and has a commercial driver's license.

be sure that the driver completes his log sheets for the day, and stops 25 miles after he leaves your yard to see if the load has shifted.

be sure that your kettle has a hazardous material placard, in addition to the "HOT" sticker mentioned above.

Because your vehicle is being driven for work-related matters, you must be sure that the driver wears his seat belt, and has received driver training. If he does not wear his seat belt, you, of course, will be fined.

Assuming you have met other OSHA safety standards, and are satisfied you will be in compliance with local and state regulations, it is now safe for you to begin. Your most dangerous act, however, is yet to come: presenting your neighbor with his bill, and explaining why your costs have increased so dramatically in the three years since these regulations have been promulgated.

Mr. Rosenow is president of the National Roofing Contractors Association in Rosemont, Ill.



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So you want to get your roof fixed...

(Annotated Version of 2/4/92 WSJ Article, Revised 6/21/94)

Suppose you own a roofing business, and one morning you get a call from the facilities manager at a local school, where the roof is leaking. He tells you that the roof is asphalt-based, and you agree to send a repair crew to try to fix it before school opens. In order to comply with federal regulations that are in effect today, here are some of the things you would have to do:

First, examine the roof and take samples to determine whether asbestos is present. There is a good chance that an asphalt roof will contain asbestos fibers, which have been embedded in asphalt, and which have been shown to remain in the asphalt even when the roof is cut into sections to be removed. If the roof is asbestos-containing, then Environmental Protection Agency and Occupational Safety and Health Administration Agency regulations will apply;¹ of course, they are different.

You will have to cut a sample from the roof, and patch it to avoid leaks at the point of the sample cut. You will then send the sample, after you have bagged it properly, to an accredited laboratory, and delay your repair work until the sample is analyzed.² (In some cases, only a certified asbestos abatement contractor is allowed to make this test cut.) You also need to examine the school's interior to make sure no asbestos would be disturbed by reroofing activities.

If you discover that asbestos is present, you must:

Notify the school in writing;

Notify the EPA Regional Office 10 days prior to beginning work, which means that the leaks will continue;³

Be sure that at least one person on your repair crew is trained to EPA's satisfaction;⁴

Conduct air monitoring on the job, once you are able to start work, to determine whether emissions of asbestos will exceed OSHA's action level or permissible exposure limits.⁵

¹EPA NESHAP 40CFR 61, 61.140 through 61.152 OSHA Asbestos Standard 1926.58, and proposed revisions.

²EPA Asbestos-Containing Materials in Schools 40 CFR Part 763 - Asbestos Hazard Emergency Response Act (AHERA) - Under AHERA, Laboratories must be accredited and follow EPA requirements for analysis of bulk samples and/or air samples of asbestos.

³EPA NESHAP 40CFR 61 - 61.145

⁴EPA NESHAP 40 CFR 61 - 61.145 and EPA notice of guidance FR 46380, September 12, 1991

⁵OSHA Asbestos Standard 1926.58 and amendment issued September 14, 1988

You can't do this, of course, until the 10-day EPA notification period has passed; Once you begin repair work, mist the roof while you are cutting it, then vacuum up what you have cut, put this dust into bags, label the bags, carefully lower them to the ground via a hoist, crane or enclosed chute, and have them taken to an approved landfill;⁶

Ensure that your employees don't smoke on the job, recognizing that you--not they--will be fined if they do.⁷

You may wonder why the school should be asked to absorb all the costs associated with these steps, since hundreds of test samples have shown no asbestos exposure above acceptable limits in roofing operations.⁸

You must ensure that your crew is trained about any hazardous materials that they may encounter. (These will include the gasoline you use to power the pump on your roofing kettle.) You will also have to be sure that copies of the appropriate Material Safety Data Sheets are present at the work site, and that all containers are properly labeled.

Your crew must also be thoroughly trained in handling these materials. This will be determined not by what steps you have taken to train them, but by what your employees tell the OSHA inspector who asks them what they have been taught.⁹

Because you are transporting asphalt at a temperature above 212F degrees, so that your crew won't have to wait two or three hours at the school for the asphalt to heat, you must:

Mark the side of your roofing kettle with a sticker that says "HOT" in capital letters;¹⁰

Complete shipping papers before the truck leaves your yard;¹¹

Have emergency response procedures developed in the event the kettle should turn over en route to the school;¹²

Be sure that your driver has been drug-tested and has a commercial driver's license;¹³

⁶EPA NESHAP 40CFR 61.145 and letter to Honorable Sonny Callahan, House of Representatives from EPA's John Seitz, Director, Office of Air Quality Planning Standards

⁷1926.58 Amended February 5, 1990

⁸Exposure to Asbestos During Roofing Removal, SRI International and Fowler Associates, 1990

⁹OSHA Hazard Communication Standard, 1926.59 and Safety Training, 1926.21

¹⁰49CFR Part 172.325 Elevated Temperature Materials

¹¹49CFR Part 177.817 Shipping Papers

¹²49CFR Part 172.203(n) Additional description requirements

¹³49CFR Part 391 Subpart H -Controlled Substance Testing and Part 383 - Commercial Driver's License Standards

Be sure that your driver completes his log sheets for the day¹⁴ and stops 25 miles after he leaves your yard to see if the load has shifted;¹⁵

Assuming you have met other OSHA safety standards,¹⁶ and are satisfied you will be in compliance with local and state regulations, it is now safe for you to begin. Your most dangerous act, however, is yet to come: presenting the engineer with the bill, and explaining why your costs have increased so dramatically in the three years since these regulations have been promulgated.

¹⁴49CFR Part 395 Hours of Service of Drivers and 396.11 Driver's Inspection Report

¹⁵49CFR Part 392.9(b)(2) Safe loading

¹⁶29CFR 1926.21 Safety Training and education; 1926.500(g) Guarding of low-pitched roof perimeters; 1926.28 Personal protection equipment

Mr. MCINTOSH. Thank you very much, Mr. Bechtel. I appreciate you coming to be with us today. I appreciate the updated article. I remember seeing that when it first appeared in the Wall Street Journal, and I think it will be effective for us to show the lack of response since that time. Let me now turn to our second witness on the panel, Mrs. Kaye Whitehead. Kaye, welcome, and I appreciate you coming here to join us today for the subcommittee.

Mrs. WHITEHEAD. Thank you, Mr. Chairman, I appreciate the opportunity to be here. First of all, I had "good morning" in my comments, but I changed that to good afternoon. My name is Kaye Whitehead. I am a farmer from Muncie, IN. Our farming operation is a family farming operation, entitled Seldom Rest Farms, which we think is very appropriately entitled. And we produce both livestock and grain.

I have traveled to be here today because I consider regulatory review and reform the most important determinant as to whether our family farm will continue. The decisions you are making today will decide if the next generation of our family will have a viable realistic opportunity on the farm. I have brought with me today a sample. This notebook that I am holding up here today contains the condensed version of thousands of pages of regulations that affect agriculture.

This handbook was created to help family farm operations like ours deal with just knowing about the regulations. In this approximately 3-inch-thick condensed version notebook, all but two areas in here affect our family farm. In many cases, we must deal with differing opinions from overlapping agencies. A good example is the micromanagement of our livestock and grain operation by the Soil Conservation Service, now the Natural Resources Conservation Service, and the Indiana Department of Environmental Management.

Our 42-year-old livestock operation was recently deemed to reside on HEL ground, that's highly erodible land, according to soil type. The Soil Conservation Service developed a conservation plan that would not allow us to till the soil. However, to obtain expansion operating permits from the Indiana Department of Environmental Management, our manure management plan stated that we were to inject all manure.

Now, I will tell you that you cannot no-till a piece of ground and inject manure. It is not feasibly possible. And yet, each agency had their own agenda, and our family farm was stuck in the middle. Wetlands regulation—in many instances, this has been the most frustrating regulation. Government agencies sit at a desk, look at soil survey maps and aerial slides and classify part of your farm a wetland without ever setting foot on it.

Unless you spend hours of time and effort to be the squeaky wheel, you may have a wetland right in the middle of land you have farmed the last 50 years. Just how wet does a piece of property have to be in order to be classified as wetland? The answer in many instances is, not very. Probably when you think of a wetland, you think of it the same way I do: swamp-like conditions, cat-tails and so forth.

However, our farming operation has had wetlands identified on ground that we have farmed for two generations. Now, we asked

that representatives from the agency physically come to the farm and flag the identified wetland areas, as they were not obvious as you looked at the field. We were told that the agency did not have the time or personnel to flag wetland areas.

So here is our dilemma—on an aerial photograph, we have wetlands vaguely identified in our field. They cannot be identified by observation. If we stray into the wetland area, we will be fined; we must repay, plus interest, moneys from the Government farm program; and barred from participating in any Government programs, including crop insurance. And yet the agencies would not come and physically identify the area.

Please keep in mind that many of these map-identified wetland areas are in 50-plus acre fields. Remember, an acre is about the size of a football field. The so-called wetland areas are usually less than two-tenths of an acre. Now those two-tenths of an acre wetland areas are now worthless to our farming operation. Yet we will continue to pay real estate taxes on those areas.

It is difficult for me to place a dollar equivalent on the expense of these two situations. We have spent considerable time over several years away from our day to day chores to meet, discuss, investigate, educate and hopefully obtain a decision. This decision must allow a future for our farming family. In viewing a more general regulatory arena, the EPA is currently conducting a special review of the triazine herbicides.

These herbicides represent a class of chemistry that has served American agriculture well for some three decades. We use cyanazine, a triazine herbicide, in our crop management plan. This plan couples the use of cyanazine with reduced tillage or full no-till practices. The National Association of State Departments of Agriculture have stated in a letter to the EPA, "Government and producer supported conservation programs involving reduced or no-till systems clearly provide major water quality benefits. These practices rely heavily on the use of herbicides, particularly atrazines."

I would urge the use of sound scientific methods by the EPA to evaluate both the risks and the substantial benefits derived from the use of atrazine, simazine and cyanazine. We must know where we are before we can determine where we need to go. In our operation, the cost of replacing as proved, safe cyanazine herbicide with the next available program would add an additional \$26,000 per year production expense in corn alone. The costs of this decision are great not only to production agriculture, but to all of society.

As a farmer, I'm used to making decisions every day. I realize that each decision has a risk attached. People everywhere make decisions every day, and each of those have associated risk. There is risk associated with all that we do. Each of us weighs the benefit versus the risk in making our decisions—getting out of bed, getting into an automobile, going for a swim, taking a walk. We accept the associated risk.

We probably determine that the benefits outweigh the risk. With this in mind, I cannot comprehend that our regulatory agencies are compelled to legislate risk-free regulation. The Delany Clause initiated in 1958 is an attempt at zero-risk law. With increased technology, the capability to monitor smaller and smaller trace level amounts, is a fact of new-age science. This, along with the con-

troversy over the reliability of data collected from the "rat test," justifies a special review docket of the Delany Clause, in my mind.

When, according to the American Council on Science and Health, a human would have to eat 28,000 pounds of apples daily for 10 years to receive the alar dosage that caused concerns in rats, and when we should have been encouraging intakes of more fruits and vegetables in children's diets, our own governmental agency that is supposed to be protecting us is providing information that may hurt instead of help.

It is time for review of the plan. In the United States, 31 different laws authorize 12 Federal agencies to spend an estimated \$1.4 billion annually to support food and agricultural safety and quality inspection. The private sector combines with State and local government to spend another \$7 billion on similar programs. In my lifetime, the number of Federal regulations have increased from 16,502 to 200,000. Add this to the proliferation of State and local regulations. We need to ask some questions.

Who benefits? Could all of these regulations really be necessary? Could any of these regulations be outdated? We need to review the plan. In my Indiana Consolidated Farm Service Agency county office, there are 75 handbooks that deal with grain farming regulations and the farm program. In 1994, the county received 555 notices of change; 245 handbook amendments; and 380 directives for specific action.

This equates to a total of 1,180 regulation changes for my county office in 1994. It is, at best, extremely difficult for the professional staff in the office to keep track of a changing regulation, much less the farmers who must be made aware of and understand these changes to therefore remain in compliance of the program. How could we possibly question the review of regulations that produced this much additional bureaucracy?

I am in favor of the Regulatory Sunset and Review Act of 1995. Regulations require review to ensure their effectiveness and need. Regulatory decisions should be based on good science, not emotion. I am concerned about the ability of our family farming operation to compete, as production agriculture has no way of passing along the cost of mounting regulations.

American farmers are being asked to be major players in global markets. Yet our competitive advantages are being eroded by over-regulation. They say that a nation that has the capability to feed itself has many problems. A nation in need of food has only one problem. Thank you.

[The prepared statement of Mrs. Whitehead follows:]

GOOD MORNING! MY NAME IS KAYE WHITEHEAD. I AM A FARMER FROM MUNCIE, INDIANA. OUR FARMING OPERATION IS A FAMILY FARM, PRODUCING BOTH LIVESTOCK AND GRAIN.

I HAVE TRAVELED TO BE HERE TODAY BECAUSE I CONSIDER REGULATORY REVIEW AND REFORM THE MOST IMPORTANT DETERMINATE AS TO WHETHER OUR FAMILY FARM WILL CONTINUE. THE DECISIONS YOU ARE MAKING TODAY WILL DECIDE IF THE NEXT GENERATION OF OUR FAMILY WILL HAVE A VIABLE, REALISTIC OPPORTUNITY ON THE FARM.

I HAVE BROUGHT WITH ME TODAY A SAMPLE. THIS NOTEBOOK CONTAINS THE CONDENSED VERSION OF THOUSANDS OF PAGES OF REGULATIONS THAT EFFECT AGRICULTURE. THIS HANDBOOK WAS CREATED TO HELP FAMILY OPERATIONS, LIKE OURS, DEAL WITH, JUST KNOWING ABOUT THE GROWING MOUNTAIN OF REGULATIONS. IN THIS APPROXIMATELY 3" CONDENSED VERSION OF IDENTIFIED REGULATIONS, ALL BUT 2 AREAS AFFECT OUR FAMILY FARM.

IN MANY CASES, WE MUST DEAL WITH DIFFERING OPINIONS FROM OVERLAPPING AGENCIES. A GOOD EXAMPLE IS THE MICROMANAGEMENT OF OUR LIVESTOCK AND GRAIN OPERATION BY THE SOIL CONSERVATION SERVICE NOW THE NATURAL RESOURCES CONSERVATION SERVICE AND INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT. OUR 42 YEAR OLD LIVESTOCK OPERATION WAS RECENTLY DEEMED TO RESIDE ON HEL (HIGHLY ERODIBLE LAND) ACCORDING TO SOIL TYPE. THE SOIL CONSERVATION SERVICE DEVELOPED A CONSERVATION PLAN THAT WOULD NOT ALLOW US TO TILL THE SOIL; HOWEVER, TO OBTAIN EXPANSION OPERATING PERMITS FROM IDEM, OUR MANURE MANAGEMENT PLAN STATED THAT WE WERE TO INJECT ALL MANURE. EACH AGENCY HAD THEIR OWN AGENDA AND OUR FAMILY FARM WAS STUCK IN THE MIDDLE.

WETLAND REGULATION. IN MANY INSTANCES THIS HAS BEEN THE MOST FRUSTRATING REGULATION. GOVERNMENT AGENCIES SIT AT A DESK, LOOK AT SOIL SURVEY MAPS AND AERIAL SLIDES, AND CLASSIFY PART OF YOUR FARM A WETLAND WITHOUT EVER SETTING FOOT ON IT. UNLESS YOU SPEND HOURS OF TIME AND EFFORT TO BE THE SQUEAKY WHEEL, YOU MAY HAVE A WETLAND RIGHT IN THE MIDDLE OF LAND THAT YOU HAVE FARMED FOR THE LAST 50 YEARS.

JUST HOW WET DOES A PIECE OF PROPERTY HAVE TO BE IN ORDER TO BE CLASSIFIED AS "WETLAND". THE ANSWER IN MANY INSTANCES IS NOT VERY. PROBABLY WHEN YOU THINK OF A WETLAND, YOU THINK OF SWAMPLIKE CONDITIONS. I DO. HOWEVER, OUR FARMING OPERATION HAS HAD WETLANDS IDENTIFIED ON GROUND THAT WE HAVE FARMED FOR 2 GENERATIONS.

WE ASKED THAT REPRESENTATIVES FROM THE AGENCY PHYSICALLY COME TO THE FARM AND FLAG THE IDENTIFIED WETLAND AREAS AS THEY WERE NOT OBVIOUS AS YOU LOOKED AT THE FIELD. WE WERE TOLD THAT THE AGENCY DID NOT HAVE THE TIME OR PERSONNEL TO FLAG WETLAND AREAS. SO HERE IS THE DILEMMA, ON AN AERIAL MAP WE HAVE WETLANDS VAGUELY IDENTIFIED IN OUR FIELD, THEY CANNOT BE IDENTIFIED BY OBSERVATION, IF WE STRAY INTO THE WETLAND AREA - WE WILL BE FINED, MUST REPAY PLUS INTEREST MONIES FROM THE GOVERNMENT FARM PROGRAM AND BARRED FROM PARTICIPATING IN ANY GOVERNMENT PROGRAMS, INCLUDING CROP INSURANCE. AND YET, THE AGENCIES WOULD

NOT COME AND PHYSICALLY IDENTIFY THE AREA. PLEASE KEEP IN MIND THAT MANY OF THESE MAP IDENTIFIED WETLAND AREAS ARE IN 50+ ACRE FIELDS. REMEMBER AN ACRE IS ABOUT THE SIZE OF A FOOTBALL FIELD. THE SO-CALLED WETLAND AREAS ARE USUALLY LESS THAN .2 OF AN ACRE. AND ARE NOW WORTHLESS TO OUR FARMING OPERATION, YET WE WILL CONTINUE TO PAY PEAL ESTATE TAXES ON THOSE AREAS.

IT IS DIFFICULT FOR ME TO PLACE A DOLLAR EQUIVALENT ON THE EXPENSE OF THESE TWO SITUATIONS. WE HAVE SPENT CONSIDERABLE TIME OVER SEVERAL YEARS AWAY FROM OUR DAY-TO-DAY CHORES TO MEET, DISCUSS, INVESTIGATE, EDUCATE AND HOPEFULLY OBTAIN A DECISION THAT WILL ALLOW A FUTURE FOR OUR FARMING FAMILY.

IN VIEWING A MORE GENERAL REGULATORY ARENA, THE EPA IS CURRENTLY CONDUCTING A SPECIAL REVIEW OF THE TRIAZINE HERBICIDES. THESE HERBICIDES REPRESENT A CLASS OF CHEMISTRY THAT HAS SERVED AMERICAN AGRICULTURE WELL FOR SOME THREE DECADES. WE USE CYANAZINE, A TRIAZINE HERBICIDE IN OUR CROP MANAGEMENT PLAN. THIS PLAN COUPLES THE USE CYANAZINE WITH REDUCED TILLAGE OR FULL NO-TILL PRACTICES. THE NATIONAL ASSN. OF STATE DEPARTMNET OF AGRICULTURES HAVE STATED IN A LETTER TO THE EPA, "GOVERNMENT AND PRODUCER SUPPORTED CONSERVATION PROGRAMS INVOLVING REDUCED OR NO-TILL SYSTEMS, CLEARLY PROVIDE MAJOR WATER QUALITY BENEFITS. THESE PRACTICES RELY HEAVILY ON THE USE OF HERBICIDES, PARTICULARLY ATRAZINES."

I WOULD URGE THE USE OF SOUND SCIENTIFIC METHODS BY THE EPA TO EVALUATE BOTH THE RISKS AND THE SUBSTANTIAL BENEFITS DERIVED FROM THE USE OF ATRAZINE, SIMAZINE AND CYANAZINE. WE MUST KNOW WHERE WE ARE BEFORE WE CAN DETERMINE OUR DIRECTION. IN OUR OPERATION THE COST OF REPLACING A PROVEN, SAFE CYANAZINE HERBICIDE WITH THE NEXT AVAILABLE PROGRAM WOULD ADD AN ADDITIONAL \$26,000/YEAR PRODUCTION EXPENSE IN CORN ALONE. THE COSTS OF THIS DECISION ARE GREAT NOT ONLY TO PRODUCTION AGRICULTURE, BUT TO ALL OF SOCIETY.

AS A FARMER, I AM USED TO MAKING DECISIONS EVERY DAY. I REALIZE THAT EACH DECISION HAS A RISK ATTACHED. PEOPLE EVERYWHERE MAKE DECISIONS EVERY DAY AND EACH OF THOSE HAVE ASSOCIATED RISK. THERE IS RISK ASSOCIATED WITH ALL THAT WE DO. EACH OF US WEIGHS THE BENEFIT VERSUS RISK FACTOR IN OUR DECISIONS. GETTING OUT OF BED, GETTING INTO AN AUTOMOBILE, GOING FOR A SWIM, TAKING A WALK, WE ACCEPT THE ASSOCIATED RISK. WE PROBABLY DETERMINE THAT THE BENEFITS OUTWEIGH THE RISK.

WITH THIS IN MIND I CANNOT COMPREHEND THAT OUR REGULATORY AGENCIES ARE COMPELLED TO LEGISLATE RISK-FREE REGULATION. THE DELANY CLAUSE INITIATED IN 1958 IS AN ATTEMPT AT ZERO RISK LAW. WITH INCREASED TECHNOLOGY, THE CAPABILITY TO MONITOR SMALLER AND SMALLER TRACE LEVEL AMOUNTS IS A FACT OF NEW-AGE SCIENCE. THIS ALONG WITH THE CONTROVERSY OVER THE RELIABILITY OF DATA COLLECTED FROM THE "RAT TESTS", JUSTIFIES A SPECIAL REVIEW DOCKET OF THE DELANY CLAUSE. WHEN, ACCORDING TO THE AMERICAN COUCIL ON SCIENCE AND HEALTH, A HUMAN WOULD HAVE TO EAT 28,000 POUNDS OF APPLES DAILY FOR 10 YEARS TO RECEIVE THE ALAR DOSAGE THAT CAUSED CONCERNS IN RATS; AND, WHEN WE SHOULD HAVE BEEN

EMPHASIZING INTAKE OF MORE FRUITS AND VEGETABLES IN CHILDREN'S DIETS. OUR OWN GOVERNMENTAL AGENCY THAT IS SUPPOSED TO BE PROTECTING US, IS PROVIDING INFORMATION THAT MAY HURT INSTEAD OF HELP. IT IS TIME FOR REVIEW OF THE PLAN!

IN THE UNITED STATES 31 DIFFERENT LAWS AUTHORIZE 12 FEDERAL AGENCIES TO SPEND AN ESTIMATED \$1.4 BILLION ANNUALLY TO SUPPORT FOOD AND AGRICULTURAL SAFETY AND QUALITY INSPECTION. THE PRIVATE SECTOR COMBINED WITH STATE AND LOCAL GOVERNMENT TO SPEND ANOTHER \$7 BILLION ON SIMILAR PROGRAMS.

IN MY LIFETIME, THE NUMBER OF FEDERAL REGULATIONS HAVE INCREASED FROM 16,502 TO 200,000. (THIS WAS AS OF 1993) ADD TO THIS THE PROLIFERATION OF STATE AND LOCAL REGULATIONS. WE NEED TO ASK QUESTIONS. WHO BENEFITS? COULD ALL OF THESE REGULATIONS BE NECESSARY? COULD ANY OF THESE REGULATIONS BE OUTDATED? WE NEED TO REVIEW THE PLAN.

THE JOINT ECONOMIC COMMITTEE FOR THE CONGRESS REVEALED IN 1992 THAT THE COSTS OF ADMINISTERING AND POLICING ALL FEDERAL REGULATION HAD REACHED ABOUT \$500 BILLION ANNUALLY. COULD WE BE SHRINKING THE PRIVATE ECONOMY SECTOR WITH ALL THIS GROWTH IN GOV. REGULATION? WE NEED TO REVIEW THE PLAN!

IN MY INDIANA CONSOLIDATED FARM SERVICE AGENCY COUNTY OFFICE, THERE ARE 75 HANDBOOKS THAT DEAL WITH GRAIN FARMING REGULATIONS AND THE FARM PROGRAM. IN 1994, THE COUNTY RECEIVED 555 NOTICES OF CHANGE, 245 HANDBOOK AMENDMENTS AND 150 DIRECTIVES FOR SPECIFIC ACTION. THIS EQUATES TO A TOTAL OF 1,180 REGULATION CHANGES FOR MY COUNTY OFFICE IN 1994. IT IS, AT BEST, EXTREMELY DIFFICULT FOR THE PROFESSIONAL STAFF IN THE OFFICE TO KEEP TRACK OF THE CHANGING REGULATION, MUCH LESS THE FARMERS WHO MUST BE MADE AWARE OF AND UNDERSTAND THESE CHANGES TO THEREFORE REMAIN IN COMPLIANCE OF THE PROGRAM. HOW COULD WE POSSIBLY QUESTION THE REVIEW OF REGULATIONS THAT PRODUCE THIS MUCH ADDITIONAL BUREAUCRACY?

I AM IN FAVOR OF THE REGULATORY SUNSET AND REVIEW ACT OF 1995. REGULATIONS REQUIRE REVIEW TO ENSURE THEIR EFFECTIVENESS AND NEED. REGULATORY DECISIONS SHOULD BE BASED ON GOOD SCIENCE NOT EMOTION.

I AM CONCERNED ABOUT THE ABILITY OF OUR FAMILY FARMING OPERATION TO COMPETE AS PRODUCTION AGRICULTURE HAS NO WAY OF PASSING ALONG THE COSTS OF MOUNTING REGULATIONS. AMERICAN FARMERS ARE BEING ASKED TO BE MAJOR PLAYERS IN GLOBAL MARKETS YET OUR COMPETITIVE ADVANTAGES ARE BEING ERODED BY OVER REGULATION.

THEY SAY THAT A NATION THAT HAS THE CAPABILITY TO FEED ITSELF HAS MANY PROBLEMS. A NATION IN NEED OF FOOD HAS ONLY 1 PROBLEM.

Mr. MCINTOSH. Thanks very much, Kaye. I appreciate you coming and bringing that forward to us. Let me turn now to the next witness on our panel, Mr. Steven Dean, president of Dean Lumber Co.

Mr. DEAN. Thank you, Mr. Chairman. I'd like to thank Mr. Chapman for inviting me to come today and tell my side of this story. I have a formal presentation here that I'd ask you to consider for the record, and I'll just speak off the cuff, if you don't mind, just for a few minutes.

Mr. MCINTOSH. That would be fine. Thank you.

Mr. DEAN. Mr. Chairman, my dad and my brother and I operate a sawmill and a lumber company and a timber management and timber farming operation in East Texas. We're in Mr. Chapman's district. We've been operating a family business since 1938. We have about 125 people working there at the mill and in our various operations. And we're one of the largest employers in our small town there in East Texas.

Our No. 1 problem, it may come as a surprise to some people, is the Federal Government. We've identified this with our association, both our manufacturing association and our forestry association. We've had executive council meetings and long range planning meetings to determine our problem. And in every case, it's been voted that the Federal Government is our biggest problem.

Back when Sam Hall was up here in the Congress, I used to come up here and visit. And we'd try to work out these problems that were created for our company and our industry. And I always told Mr. Hall then that if you all would just stop every other session and just throw out the bad laws that you've already got and all the bad regulations, and then the next session, come back to work and work on some new, good ones, that everything would get a lot better.

So I was really pleased when Mr. Chapman called me Thursday and asked me to come up here and talk about this, because this is probably the best bill I've ever seen come before this august body. And I certainly do hope that we can get it passed.

Mr. MCINTOSH. Thank you.

Mr. DEAN. This is the product here, or one of them, that we manufacture. It's called a 2 by 4. This one here is—actually this was pressure treated. We also make pressure treated wood. It has a pressure treatment that makes it a nonfood for termites, and it also makes it resistant to rot and decay. Now, when I was getting ready, Sunday afternoon, to come up here, I went out to a construction project that was going on and picked this up off the floor out there.

Actually, where it was sitting, it was hazardous waste. But when I picked it up and decided to use it for a prop, it became a product. But I flew it all the way up here on an airline in my briefcase and wasn't even questioned about it, but it is hazardous waste. It's very dangerous. It's been determined by the EPA to be very, very, very hazardous. We spend probably millions of dollars each year protecting ourselves from this thing. [Laughter.]

We have some more problems, too. We have OSHA. They come around and check us. And we had this OSHA inspector come in a couple of years ago, and he was kind of laughing. Those guys kind

of take a different view of it, you know. One of the sawmills over in Mississippi was inspected in 1992. They found a few violations—this is right after they passed the sevenfold regulation about if—for a while there, if you had a violation, maybe they'd fine you \$100,000. But when they decided to go sevenfold, then it would be \$700,000.

So this sawmill in Mississippi was fined \$700,000 for OSHA violations. And I called all my people together and I said, you know, if that same OSHA inspector comes to our sawmill and inspects us, we'll be out of business, because we're not worth \$700,000. We didn't make that much money not only last year, but several years. So we invited an OSHA guy to come up and talk to us.

And he was sitting there in my office, kind of laughing about this MSDS, which is a program with it's material safety data sheet. And everything that you have on your property is supposed to have an MSDS in your file for your employees to read. And he was telling me that this one company had some liquid paper in their office and they did not have an MSDS on file in the office.

And the OSHA guy fined them \$500 for not having an MSDS on file for liquid paper. So you better be careful if you've got some of this in your desk.

Mr. MCINTOSH. Wait until they start applying OSHA to Members of Congress. [Laughter.]

Mr. DEAN. Right. And then, of course, everybody knows what this is right here. This is just a bottle of distilled water or boiled water or bottled water, whatever you want to call it. And I was telling this fellow on the plane last night, we were flying up here, I said, you know what this right here is? He said, yeah, I know what that is. I said, well, do you know that I have to have a Federal permit to pour this out on my property? I really do.

And I have to have an engineer tell me how to apply for the Federal permit. And it's part of my stormwater runoff plan. But anyhow, we have to deal with that. And he said, that doesn't make any sense, does it? I said, no, it doesn't; that's why I'm going to Washington. And in my handout, I've got another thing. It's a letter from an insurance company that says that a law firm in Austin is suing me because the office that they just moved into recently has sick building syndrome.

We've got so many regulations and rules and everything now that everybody just thinks that it must be somebody else's fault if I'm sick or if I don't feel good. So all these lawyers down there are going to sue me for sick building syndrome. I never heard of any of these people. But apparently, one of my customers sold them one of these dangerous 2 by 4's here. And now they're going to sue me—and they're going to sue everybody that's applied anything to that building project.

And the same fellow I was sitting by on the airplane last night, when he read this letter, he said, hell, even Ray Charles could see right through that. [Laughter.]

So anyhow, I thought that was pretty good. So excuse me for the French, there; I'm almost through. But anyhow, I did want to also point out in my handout here that I have an article from George McGovern, who was up here for quite a long time, too. And when

he left here, he tried to run a business, and he went bankrupt dealing with Federal regulations.

So I do commend Mr. Chapman for trying to get something done about all this. And I certainly do commend you for staying here, listening to all this. And I appreciate everything you're trying to do.

[The prepared statement of Mr. Dean follows:]

Statement

of

Steve Dean
Dean Lumber Company

before the

Subcommittee on National Economic Growth, Natural Resources
and Regulatory Affairs

March 28, 1995

Mr. Chairman, my name is Steve Dean. I, along with my brother, operate a hardwood and softwood sawmill and lumber treating company in Gilmer, Texas. Our company is a member of both the Southeastern Lumber Manufacturers Association and the American Wood Preservers Institute. I want to thank you, and particularly thank Congressman Chapman, for allowing me the opportunity to testify on H.R. 994, the Regulatory Sunset and Review Act of 1995.

This is a sample of the products I manufacture (hold up 2 x 4 pressure treated wood). I would like to tell you the federal, let alone state and local agencies, I must deal with on a daily basis as well as examples of some of the regulations with which I must comply.

Obviously, I must comply with Internal Revenue Service regulations. Congress has previously attempted to alleviate the unnecessary impact of the IRS on my business by passing the Taxpayer Bill of Rights. I understand a new, second version of the Taxpayer Bill of Rights is now moving through the House. I urge you to look at that bill and hopefully support it.

Beyond the IRS, I must comply with OSHA regulations governing all aspects of plant safety including issues such as wood dust; EPA regulations; Department of Labor regulations governing pension plans; Equal Employment Opportunity regulations; and, Department of Justice regulations governing the Americans with Disabilities Act; Department of Transportation regulations; Department of Agriculture FIFRA regulations and on, and on, and on. I have appended to my testimony a brief list of some of the regulations imposed on my business by just EPA, OSHA and

DOT. I've also included a newspaper article written by your former colleague, the Honorable George McGovern, a note from the former Commissioner of the Texas Employment Commission, Mary Scott Nabers, and a humorous takeoff on some of the impossible EPA regulations we face. I've also attached a letter I received advising me of another lawsuit, I believe that makes three right now that I'm dealing with.

Mr. Chairman, nobody questions the need for a safe workplace. Nobody questions the need for taxpayer compliance. Nobody in our company wants to willingly or even inadvertently pollute the environment. And, nobody wants to discriminate against the handicapped or against any person because of that person's gender, religion, or race. But the cumulative impact of these regulations is overwhelming for the average business owner. It is impossible to both run my business and know what these regulations require of me, especially when there are additional state and local regulations which I am supposed to know and abide by.

H.R. 994 is a good bill which will help address the problem of overburdensome regulations by requiring the periodic review and automatic termination of regulations. I just hope that when you adopt this bill, you include a provision that requires it to be carried out without adding any additional staff. That's the way we have to operate our business every time we see a new rule or regulation. It will help get the proverbial monkey off our backs. I urge its adoption.

Environmental Protection Agency

RCRA. Various hazardous waste regulations including:

Generator Requirements

Spill Contingency Plans

Preparedness and Prevention Plans

Annual employee training

Recordkeeping and Documentation

- manifests
- biennial reports
- land disposal restrictions
- waste analysis records
- retention of paperwork

Subpart I - Container storage of waste

Subpart J - Tanks

Subpart W - Drip Pads

- pad cleaning requirements
- inspection records
- repair records and reporting
- drippage records
- waste removal documentation
- routine maintenance records
- written operating history
- storage yard contingency plan

Clean Water Act

Stormwater Permits

Stormwater sampling and analysis

Best management practices for run-on and run-off

Clean Air Act

Title V Permit covering boilers, kilns, cyclones, dust, etc.

EPCRA

Tier I and Tier II annual reporting

Submission of MSDSs

Form R reporting (biannual)

Spill reporting

FIFRA

Certified Applicator annual training

Applicator License

TSCA

Maintain files on allegations of adverse health effects

Occupational Safety and Health Administration

Hazard Communication Program

- Material Safety Data Sheets
- hazard warning labels
- employee training
- written safety program

Personal Protective Equipment Program

Forklift Safety Program

Forklift Operator Safety Program

Respiratory Protection Program

Lock Out / Tag Out Program

Confined Spaces Program

Hearing Conservation Program

General Safety Program

- electrical
- fire
- ladder safety
- walking and working surfaces
- welding and hot surfaces
- tool safety
- etc.

Spill Response Plan

Accident Response, Reporting, and Investigation Program

Medical Monitoring Program

Department of Transportation

Shipping papers

Manifests

Placarding

Labeling

Training

The Lincoln Group

March 7, 1995


CERTIFIED MAIL # 795 485 787
RETURN RECEIPT REQUESTEDDean Lumber Co.
P.O. Box 610
Gilmer, TX 75644RE: Claim No.: 00-L-23230
Regarding: Gibbons, Winckler & Harvey vs. Glenn Davis
Construction, et al.
Date of Incident: 7/5/94

To Whom It May Concern:

Please accept this letter as first report of a possible General Liability claim. According to the information developed to date, your company was involved in a remodeling project for the above captioned plaintiff. The loss occurred at 607 14th Street, Austin, Texas.

Apparently, the building has developed "sick building syndrome" and several employees of the law firm have become ill as a result of some foreign substance in the building. This letter is to request that, if you have not already done so, you immediately report this matter to your General Liability carrier. Please feel free to have them call us, and we will be more than happy to discuss the details of this situation with them further.

Sincerely,


Ann L. Brandt
Senior Claims Examiner
The Lincoln Insurance Company

ALB:nlm

c: Dean Lumber Co.
P.O. Box 610
Gilmer, TX 75644



This is a story that depicts a relationship between Industry and the EPA. GOD will be playing the role of Industry and the HEPA will play the roll of the EPA. HEPA, for those of you who may not know, stands for the Heavenly Environmental Agency. The story goes like this

In the beginning God created heaven and earth. God felt quite proud of his accomplishment, but his smile turned into a frown when He learned that He was faced with a class action law suit for failing to file an environmental impact statement with the HEPA. As you may well imagine the HEPA is totally dedicated to keeping the universe pollution free!

At the hearing, God was granted a variance permit for the heavenly portion of the project, but at the same time was issued a cease and desist order for the earthly portion pending a further investigation by the HEPA. God was asked to complete his construction permit application and the environmental impact statement and was required to appear before the HEPA Regulatory Board to answer a series of questions. When asked by HEPA why he started this project in the first place, God simply replied, "I like to be creative". However, HEPA did not consider this to be an adequate answer and required him to supply more data to support his position.

HEPA could not see any practical use for earth since it was void and dark. Then God said, "Let there be light". He should have never brought this point up since one member of the review board was active in the Sierra Angel Club and immediately protested and said, "How will you make light"? Would there be any runoff, groundwater contamination, or air pollution?

God said, "The light would come from a huge ball of fire". The review board couldn't understand this, but would accept it with the following stipulations: There would be no smoke or fog resulting from the ball of fire, and a burning permit would be obtained. Since continuous light would be a waste of energy, the HEPA decided that it should be dark at least one-half of the time. God agreed to this and divided the light and the darkness and called the light, day and the darkness, night. The Review Council expressed no interest whatever with God's inhouse semantics.

God told the Review Board He wanted to have some rivers and lakes. The Board reluctantly ok'd this appeal provided an NPDES Discharge Permit was submitted to the agency.

It appeared everything was in order until God stated that He wanted to complete the project in six days. The Review Board told him that this was completely out of the question and that a minimum of 160 days would be required by the HEPA to review his application and the environmental impact statement and then conduct a public hearing. They estimated it would take 10 to 12 months before a permit could be granted. Upon hearing this disappointing news, God simply said, "To Hell with it".

COMMISSIONER'S NOTES



Mary Nabers

Going Fishing

- What is happening to society?
- How healthy are our businesses?
- How competitive are we as a state?
- How stable is this economy?
- Where are we headed?

Some of the major issues facing both large and small employers in Texas involve:

- Drugs, alcohol and violence in the workplace
- Social, psychiatric and stress-related symptoms affecting employees

•Discrimination, harassment, racial and ethnic tension

•Illiteracy, low skills and educational underachievement

•The escalation of health and insurance costs

•Unprecedented legal liabilities and regulatory procedures

It is enough to make any employer want to surrender, give up...or just go fishing.

Printed below is a letter I received from a Texas employer a few years ago. I have shared it with audiences numerous times as I speak to business groups around the state. I print it now to make a very important point. These are difficult times for men and women in business. Nothing is easy. Problems abound and solutions are elusive...but solutions are possible provided good people do not surrender and throw in the towel. Simply put, Texas employers cannot afford to go fishing! (Unless it is just a one-day outing.)

Dear Commissioner Nabers,

This worn out key will open the front door to a business I've owned and operated for the past 42 years in Texas.

It isn't a large company, but it's paid for and it's clean. It's provided services in the last four decades to a lot of loyal customers and it's provided jobs for a lot of good people.

But, now it's yours . . . or, maybe you can give it to someone

else. I'm old, and I'm tired. But more important is the fact that I refuse to let my American dream become an American nightmare.

You see, I can no longer generate enough funds to help the government wipe out all the injustices of the world, educate the masses who cannot even read, keep the regulators satisfied, protect myself and my workers with adequate insurance coverage, motivate new employees who have no work ethic, deal with drug testing and AIDS in the workplace, stay abreast of the changing legalities and liabilities imposed on me, and support a state and national government that seem to have lost touch with people like me.

Forgive me Commissioner Nabers, but I'm through. Tell your tax department to find someone else to open up this business on Monday morning or just close out my tax account because I am going fishing!

The problems the writer enumerates are all real, no doubt about it! The frustration is universal, but there are solutions. And there are rewards!

The greatest reward of all is economic prosperity in a democratic society, and that magnificent prize could be lost if good people in Texas just go fishing.

Statewide Internship Program a Boon for Texas Business

TEC is investing in tomorrow's work force with a new statewide internship program.

This fall, Commissioner Mary Scott Nabers and others will begin working with college students in a structured employment law internship program. Students will learn

firsthand about state government, employment laws, hiring and firing issues, the unemployment appeals process, interviewing techniques and the state's employment agency. Students entering the work force after TEC internships will be well versed in employment law.

TEC is looking for sponsors who will encourage these students and perhaps offer them a stipend during their internships. Employers who would like to participate in the program should call Faith Thornton at 1-800-832-6279.

A Politician's Dream Is a Businessman's Nightmare

"Wisdom too often never comes, and so one ought not to reflect at merely because it comes late." — *Julius Felix Preussner*

It's been 11 years since I left the U.S. Senate, after serving 14 years in high public office. After having a career in public office, I have been in the business world for 11 years. I have been in the business world for 11 years. I have been in the business world for 11 years.

In 1944, I invested most of the earnings from this lecture circuit in acquiring the household on Connecticut's Stratford Inn. Models, linen and restaurants have always held a special fascination for me. The Stratford Inn prompted by realization of a business dream to turn a combination hotel, restaurant and public clubhouse into a single business unit.

In retrospect, I wish I had known more about the hazards and difficulties of such a business, especially during a recession of the kind that hit New England just as I was acquiring the Inn's 45-year, leasehold. I also wish that during the years I was in public office, I had had this firsthand experience about the difficulties business people face every day. That knowledge

would have made me a better U.S. senator and a more understanding presidential contender.

Today we are much closer to a general acknowledgment that government must encourage business to expand and grow. Bill Clinton, Paul Tsongas, Bob Kerrey and

Manager's Journal

By George McGovern

others have, I believe, changed the debate of our party. We intuitively know that to create job opportunities we need entrepreneurs who will risk their capital against an expected payoff. Too often, however, public policy does not consider whether we are creating out those opportunities.

My business perspective has been honed to that small hotel and restaurant in Stratford, Conn., with an especially difficult lease and a severe recession. But my business associates and I also lived with federal, state and local rules that were all "peased with the objective of helping employees, protecting the environment, raising tax dollars for schools, pro-

tecting our customers from fire hazards, etc. While I never have doubted the worthiness of any of these goals, the concept that most often chafes legislators is: "Can we make consumers pay the higher prices for increased operating costs that account for public regulation and government reporting requirements with means of redress?" It is a jungle out there that is

filled with stories about businesses dropping health coverage for employees. We provided a substantial package for our staff at the Stratford Inn. However, we are operating today, those costs would exceed \$150,000 a year for health care on top of salaries and other benefits. There would have been no reasonable way for us to absorb or pass on these costs.

Some of the most serious problems facing business today are the cost of health care, the impact of inflation on the cost of doing business, and the cost of doing business. While we cannot assess the merit of all these claims, I've also witnessed firsthand the explosion in blame-shifting and scapegoating for every negative experience in life.

Today, despite bankruptcy, we are still dealing with litigation from individuals who fell in or near our restaurant. Despite

laws, injuries, not every restaurant is the fault of someone else. Not every such incident should be viewed as a lawsuit, but of an unfortunate accident. And while the business owner may prevail in the end, the modest expense to litigious consumers and litigating attorneys is frightening. Our West bankrupt for a variety of reasons, being a significant cause. But that reason was the variety of other challenges we faced that drive operating costs and financing charges beyond what a small business can handle.

It is clear that some businesses have products that can be priced at almost any level. The price of raw materials (e.g., steel) has plummeted in the past few years, and the price of many commodities has fallen. Consumers, it is only competition or self-interest that tempts price increases. Customers may delay purchases, but they have little choice when faced with higher prices.

In services, however, consumers do have a choice when faced with higher prices. You may have to stay in a hotel on vacation, but you can stay fewer days. You can eat in restaurants fewer times per month, or forgo a number of services from car washes to shoe shines. Every such decision eventually results in job losses for someone. And often these are the people without the skills to help themselves to the people I've spent a lifetime trying to help.

In short, "one-size-fits-all" rules for business ignore the reality of the marketplace. And setting thresholds for regulatory guidelines at artificial levels—e.g., 99 employees or more, \$500,000 in sales—takes no account of other realities, such as profit margins, labor intensive vs. capital intensive businesses, and local market economics.

The problem we face as legislators is: Where do we set the bar so that it is not too high that we have the power to do better than we are now? In part, making these questions more often.

Mr. McGovern, an 1977 Democratic presidential candidate, is president of the Public-Business Policy Council in Washington.

THE WALL STREET JOURNAL MONDAY, JUNE 1, 1992

Mr. MCINTOSH. Thank you very much. Our goal is to get your message to all of the other Members of Congress as well. So I appreciate you coming up and sharing that with us. Let me turn now to our next witness on the panel, Mr. Joe Bob Burgin.

Mr. BURGIN. Thank you, Mr. Chairman. My name is Joe Bob Burgin. I am from Sulphur Springs, TX, and I operate two convenience stores with gasoline outlets at each location. I am president of the Sulphur Springs Chamber of Commerce, and have been in the convenience store industry for about 8 years. I want to thank you, Mr. Chairman, and the members of this subcommittee, for calling this important hearing.

I am appearing here today on my own behalf, at the suggestion of my Congressman, Jim Chapman, who I've known for many years. I guess my invitation to appear before you here today means that Jim has gotten tired of hearing my complaints about excessive and duplicative Government regulations, and has decided to let me spout off to you instead.

I am a small businessman, not a lobbyist, not a politician nor an attorney. As a result, I have not prepared a full-blown analysis of the legislation under consideration today. However, I can tell you this—any law that helps to reduce the number of local, State and Federal regulations imposed upon small businesspeople has got to be for the better.

For that reason, I lend my support to H.R. 994. Stated bluntly, my business and thousands of other small businesses nationwide, are choking to death on the huge number of State and Federal regulations imposed on our businesses. While I have no doubt that some of these regulations may be prudent and well-intentioned Government attempts to address concerns about protecting our environment, the costs to my business of complying with these myriad regulations are becoming overwhelming every year.

Let me give you an example. I sell gasoline at my convenience stores. Over the past several years, they've required me to put leak detectors on my underground lines and tanks. They've required me to have annual tightness tests on my underground lines and tanks. They have required me to buy third-party liability insurance—in case I do have an underground leak and I spoil someone else's property, I have insurance to take care of the cleanup.

They require me daily to balance, within one-eighth of an inch, each one of my underground tanks of fuel. The State and Federal Governments also have required that I install overfill and overspill containments measures on my tanks, while at the same time, mandating that I upgrade my storage tanks by 1998. These requirements have cost me, and will cost me, tens of thousands of dollars at each of my stores.

And these mandates are in place despite the fact that I have never had a significant leak or spill at one of my locations. These regulations represent only the tip of the environmental regulatory iceberg. It would take me most of the morning to detail the Federal and State Environmental and Employee Safety Regulations and reporting which I am required to comply with.

How am I supposed to pay for all these Government mandates and still make a living and maintain jobs for my employees? Some in our industry are trying to borrow money to make the required

upgrades to their gasoline operations. However, most banks stopped lending to most convenience store operators, fearing potential liability under Superfund or our nations solid waste disposal laws.

And the one Government action that could have helped this situation—freeing up capital by issuing a regulation clarifying the secured lender exemption—has been delayed and delayed and delayed by our EPA. In short, I fully support Federal regulation to review and get rid of all regulations that have outlived their purpose, duplicate other regulations currently on the books, or are excessively costly to small businesses.

In fact, I would urge this subcommittee to even look further and examine State regulations as well. While most environmental and safety regulations flow down from Federal mandates, State regulations, which often conflict or are already covered by Federal regulations, are a substantial problem for small businesses as well. I can tell you that I speak today for our businesspeople far beyond the convenience store industry.

As president of our Chamber of Commerce, I talk daily to our business owners in our community. No matter what industry you're in, complaints are the same: Government micromanaging your business and imposing duplicate requirements and senseless reporting. Government regulation is drowning small businesses like mine. If this legislation is the first step toward reducing my regulatory burden, then I urge you to pass it now.

We need relief, sir. On a slightly more optimistic, and a truly sincere note, I can tell you that I and people I talk to every day have a great deal of hope for this Congress. We have faith that Congress can set this country on a course toward deregulation. We need your help. I thank you very much, and am glad to answer any questions.

[The prepared statement of Mr. Burgin follows:]

TESTIMONY OF JOE BOB BURGIN
BEFORE THE
SUBCOMMITTEE ON NATIONAL ECONOMIC AFFAIRS,
NATURAL RESOURCES & REGULATORY AFFAIRS
OF THE
HOUSE GOVERNMENT REFORM
AND OVERSIGHT COMMITTEE
ON THE
"REGULATORY SUNSET AND REVIEW ACT OF 1995"

March 28, 1995

Good morning. My name is Joe Bob Burgin. I am from Sulphur Springs, Texas, where I own and operate two convenience stores with gasoline operations. I am President of the Sulphur Springs Chamber of Commerce, and have been in business a little over eight years.

I want to thank you, Mr. Chairman, and the members of this Subcommittee, for calling this important hearing. I am appearing here today on my own behalf at the suggestion of my congressman, Jim Chapman. I have known Jim for years. I guess my invitation to appear before you today means that Jim has gotten tired of hearing my complaints about excessive and duplicative government regulations and has decided to let me spout off to you instead.

I am a small businessman -- not a lobbyist, a politician, or an attorney. As a result, I have not prepared a full-blown analysis of the legislation under consideration here today. However, I can tell you this: any law that helps to

reduce the number of local, state, and federal regulations imposed upon small businesspeople has got to be for the better. For that reason, I lend my support to H.R. 994.

Stated bluntly, my business, and thousands of other small businesses nationwide, are choking to death on the huge number of state and federal regulations imposed on our businesses. While I have no doubt that some of these regulations may be prudent and well-intentioned government attempts to address concerns about protecting our environment, the costs to my business of complying with these myriad regulations are becoming overwhelming.

Let me give you an example. I sell gasoline at my convenience stores. Over the past several years, the State of Texas has required me to install monitoring devices for my underground fuel storage tanks and on my fuel lines. I am required to have third party liability insurance in case a fuel spill at one of my locations harms someone else's property. The state and federal governments also have required that I install overfill valves and overfill containment measures, while at the same time mandating that I upgrade my underground storage tanks by 1998.

These requirements have cost me, and will cost me, tens of thousands of dollars at each of my stores. And these mandates are in place despite the fact that I have never had a significant leak or spill at one of my locations.

These regulations represent only the tip of the environmental regulatory iceberg. It would take me most of the morning to detail the federal and state environmental and employee safety regulations and reporting with which I am required to comply.

How am I supposed to pay for all of these government mandates and still make a living and maintain jobs for my employees?

Some in our industry are trying to borrow money to make the required upgrades to their gasoline operations. However, most banks have stopped lending to convenience store operators, fearing potential liability under Superfund or our nation's solid waste disposal laws. And the one government action that could help this situation -- freeing up capital by issuing a regulation clarifying the secured lender exemption -- has been delayed and delayed by EPA for no apparent reason.

In short, I fully support federal legislation to review and get rid of all regulations that have outlived their purpose, duplicate other regulations currently on the books, or are excessively costly to small business. In fact, I would urge this Subcommittee to share its findings from this hearing with State legislators and regulators as well. Many times, state environmental and safety regulations, which flow down from federal mandates, conflict or are already covered by federal regulations.

I can tell you that I speak today for businesspeople far beyond the convenience store industry. As President of our Chamber of Commerce, I talk daily to other business owners. No matter what industry you are in, the complaints are the same: government micro-managing your business and imposing duplicative requirements and senseless reporting.

Government regulation is drowning small businesses like mine. If this legislation is the first step towards reducing my regulatory burden, then I urge you to pass it now. We need relief, or we simply will not be around in the near future.

On a slightly more optimistic note, I can tell you that I, and the people I talk with, have a great deal of hope for this Congress. We have faith that this Congress can set this country on a course towards deregulation. We need your help.

Again, thank you for the opportunity to testify here today. I would be glad to answer any questions you may have.

Mr. MCINTOSH. Thank you very much, Mr. Burgin, and thank you for that voice of confidence. Let me turn now to our final witness on this panel, Mr. Paul Mashburn of Viking Builders.

Mr. MASHBURN. Thank you. Mr. Chairman, members of the subcommittee, thank you for the opportunity to appear in support of H.R. 994, the Regulatory Sunset and Review Act of 1995. My name is Paul Mashburn. I'm the owner and president of Viking Builders, a small volume builder and developer located in Winter Park, FL. I'm a constituent of Congressman Mica's.

I've been involved in the building business for well over 20 years, and can tell you from personal experience that current regulatory overkill is the central reason that I made the conscious decision, in 1990, to phase out our building and development activities and give it to the big boys. The risk benefit no longer made sense for me as a small businessman.

At the outset, Mr. Chairman, let me thank you, your ranking member, and so many other members of this subcommittee for their leadership on the issue of regulatory reform. The housing industry is one of the most heavily regulated sectors of our economy, especially when one considers the layered effect of local, State and Federal requirements.

Unfortunately, the cost of so many unnecessary, overlapping and duplication of regulations often serves as nothing more than a hidden tax on the housing consumer. I commend the House passage of the broader regulatory moratorium legislation, including things like compensation for private property takings and et cetera. These actions represent a giant step in the direction of lifting that burden of red tape and overregulation off the backs of America's builders, and we thank you.

Now let me provide you with three quick examples that will illustrate the very real and positive impact that the implementation of the bill's review sunset procedures could previously have had, and can still have prospectively at the Federal agency level. Wetlands—the burdensome Federal regulation of wetlands has created significant problems for home builders and property owners.

Some builders have faced waits of 2 to 3 years to obtain Federal wetlands permits to build on their land, spending hundreds of thousands of dollars in legal and engineering fees to clear the permit hurdles to build on dry wetlands. When the Clean Water Act was first passed in 1972 and amended in 1977, the statute did not even mention the word, wetlands. Only later did the Federal agencies of the jurisdiction interpret statutory references to the "waters of the United States," to include wetlands.

The act gave oversight of its section 404 to two agencies, the Army Corps of Engineers and EPA. This dual administrative structure of the section 404 program has fostered 18 years of controversy and excessive permit processing times. Policy disputes between these two agencies have left permit applicants without any meaningful guidance on key program standards.

Lacking any further direction from Congress, the Corps and EPA have systematically engaged in a practice of making policy decisions behind closed doors, without the benefit of public notice and comment. These decisions have resulted in vast amounts of land being inappropriately classified as Federal jurisdictional wetlands,

regardless of their value or importance as ecologically sensitive areas.

The next example. In 1973, Congress passed the Endangered Species Act, ESA, making it a Federal offense, to buy, sell, possess, export or import any species listed as endangered or threatened, or any product made from these species. The law also directed Federal agencies to ensure that their actions, including the granting of construction permits to private companies, did not jeopardize listed species.

Economic impact was prohibited from being considered when making these determinations. In 1989, Congress bypassed the opportunity to reform the ESA in a meaningful manner, and essentially rubber-stamped the act for an additional 5 years. Preservation groups and no-growth advocates have discovered that the ESA is an effective tool to halt development in home construction.

In recent years, a temporary restraining order by a Federal judge blocked government timber sales from lands involved in the much-publicized spotted owl dispute. The result—a corresponding volatility in lumber prices, which had the residual effect of damaging housing affordability. But beyond being used as a surrogate to achieve environmental objectives other than the protection of endangered species, ESA listings have had, also, a major impact on municipalities.

And I'll use, as the example, from the State that Mr. Chapman is from. The city of Austin, TX, was recently beset by the ESA listing of the Black-Capped Vireo and the Golden Cheeked Warbler. The Fish and Wildlife Services listed both birds as endangered, with the Texas hill country surrounding Austin the primary center of their habitat. Because there are less than 1,000 birds nationwide, FWS has taken an especially strong stand.

So Austin city officials, in conjunction with private sector, have devised a conservation plan that sets aside large tracts of land as a prospective preserve, with more than 200,000 total acres being required for their protection. At what cost? The city's chief appraiser stated that the value of the affected land would be reduced from approximately \$336 million to \$15 million, with the annual tax levy reduced from \$6.7 million to around \$300,000.

Beyond the proposed set-aside, the appraised value of the average home in Austin dropped from roughly \$71,000 to \$68,000, with the city forced to deal last year with a \$1.6 million shortfall, based on the affected property tax rate. Officials in Riverside County, CA, also became mindful of similar dangers in the face of an ESA listing the Shepherd's Kangaroo Rat.

The designation slowed on-line development there for more than 2 years, and cost builders more than \$20 million in special environmental fees to help save the rodent and its habitat. There should be a more rational approach to the protection of endangered species. Congress should examine possible ESA amendments that would require, one, an economic impact statement to accompany a proposed listing for a species; two, a determination that a species is recoverable before the final listing of a species; and three, an equitable financial responsibility for habitat conservation plans, rather than tapping building fees as a primary source of revenue.

And last, and one that many people have talked about already is OSHA. With regard to OSHA, the Federal Occupational Safety and Health Administration Rulebook for Construction weighs in at nearly 600 pages. No small business owner should be faced with Government regulations of that length and detail and be expected to comply with a multitude of regulations from other Federal, State and local agencies.

Unfortunately, current OSHA construction standards make absolutely no distinction between a small homebuilding remodeling site and a major industrial or commercial public works project. Obviously, the hazards posed by these two construction sites are substantially different. Several of these specific standards, including those dealing with excavation and trenching, the use of stairways and ladders, and fall protection and scaffolding, have proved to be particularly difficult and sometimes impossible for homebuilders to comply with during phases of house construction.

Consequently, most homebuilders believe that Congress should direct Federal OSHA to simplify its construction rules, specifically for construction of low-rise residential structures to make them economically and technologically feasible without reducing safety for employees. And you've already heard from one of the other witnesses with regard to haz-com rules and the material safety data sheets, so I won't go into that.

OSHA's fall protection requirements were recently revised and contain requirements that affect any construction employer who has workers exposed to potential falls greater than 6 feet. The required fall protection equipment, the written provisions and the training requirements are extreme in comparison to other rules that affect construction. Under the sweeping 6-foot rule, even the most minor hazards will result in thousands of dollars spent to complete needless paperwork in order to achieve compliance.

Simply stated, Mr. Chairman, the passage of H.R. 994 would compel the Congress to fulfill its proper role as the oversight body for all Federal regulatory agencies. And those same agencies would be required to take a regular, meaningful inventory of their regulatory authority, including those example areas that I've outlined here today.

Mr. Chairman, for the reasons I stated in my testimony, I strongly encourage this subcommittee and the full Congress to pass H.R. 994 as quickly as possible. I'd be happy to answer any questions you may have. Thank you.

[The prepared statement of Mr. Mashburn follows:]

STATEMENT OF
PAUL MASHBURN, VIKING BUILDERS

BEFORE THE
 SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH,
 NATURAL RESOURCES AND REGULATORY AFFAIRS
 OF THE
 COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT
 U.S. HOUSE OF REPRESENTATIVES
 ON

H.R. 994, "THE REGULATORY SUNSET AND REVIEW ACT OF 1995"

Mr. Chairman, Mr. Peterson, and Members of the Subcommittee:

Thank you for the opportunity to appear this morning in support of H.R. 994, the "Regulatory Sunset and Review Act of 1995." My name is Paul Mashburn and I am President of Viking Builders, a firm located in Winter Park, Florida which specializes in the construction of single-family homes. I have been involved in the home building business for well over twenty years, and can tell you from personal experience that the current regulatory environment is much more burdensome than when I first entered the business in the 1970's. In fact, regulatory overkill is one of the central reasons that I have become a "small volume" builder. I am also a constituent within Florida's Seventh Congressional District -- which, as you know, is represented by your colleague Mr. Mica.

OVERVIEW

At the outset, Mr. Chairman, let me thank you and your Ranking Member -- and so many other Members of this Subcommittee -- for the tremendous leadership you have already shown on the issue of regulatory reform. As you know, the housing industry is one of the most heavily regulated sectors of our economy -- especially when one considers the layering effect of local, state and Federal requirements on top of one another. Unfortunately, the cost of so many unnecessary, overlapping and duplicative regulations often serve as nothing more than a hidden tax on the housing consumer.

As Benjamin Franklin told us in 1789, nothing is certain in life but death and taxes. I would submit, however, that if you're a builder today, Franklin's phrase needs to be amended to also include government regulation. Actually, with a good accountant, taxes can be deferred and with modern medical science, even death can be held back for a time. Only compliance with government regulations cannot be postponed - that is, if you want to stay in business for any length of time.

The House passage of a regulatory moratorium -- in combination with broader reforms such as compensation for private property "takings", required cost/benefit analyses and risk assessments by regulators, and the strengthening of the Paperwork Reduction and Regulatory Flexibility Acts -- represents a giant step in the direction of lifting that burden of red tape and overregulation off the backs of America's builders -- and we thank you.

SYNOPSIS OF H.R. 994

I am here today, however, because I believe that the passage of H.R. 994, as introduced by Congressmen Chapman, DeLay and Mica, would be yet another major improvement to our nation's Federal regulatory system. As I understand it, Mister Chairman, their proposal would terminate all existing regulations in seven years unless they were reauthorized by the appropriate Federal agency. New regulations promulgated after the enactment of the bill would be subjected to a three-year "sunset" unless reauthorized. Following any reauthorization, all regulations would still be subject to review every seven years thereafter.

Additionally, H.R. 994 would require all agencies to:

- establish an individual -- a "regulatory review officer" -- to be responsible for the review of all Federal regulations under that agency's jurisdiction and carrying out all requirements of the Act; and,
- submit to Congress and publish in the Federal Register within 100 days of the bill's enactment a comprehensive plan for reviewing all rules within its jurisdiction -- including a "time-line" stating when each regulation will be up for review.

Among other things, the agency's review would be intended to determine:

- the cost of the regulation on local, state and national economies;
- whether the social benefits of the regulation outweigh the costs to the regulated;

- how those costs would specifically impact small businesses and the consumer; and,
- whether or not the regulation is clear and unambiguous or causes unnecessary litigation.

Based on this review, the affected agency would be obliged to make recommendations concerning the need for the rule's potential reauthorization, modification, or termination. A regulation would automatically terminate if it is not reauthorized by the agency prior to its sunset date.

At least 120 days prior to a rule's "sunset" date, the affected agency would be required to transmit its review recommendations to the White House Office of Management and Budget (OMB) -- specifically to the OMB Office of Information and Regulatory Affairs (OIRA). The agency would also be required to submit its review comments to the appropriate congressional authorizing committees and print them in the Federal Register.

The authorizing committees would retain the discretion to determine whether or not to review any of the agency's recommendations. Congress and OIRA would then have 60 days to provide their comments and recommendations to the agency.

The agency would then review and consider this congressional/White House feedback and publish its final "sunset" recommendations in the Federal Register. The agency's recommendations would go into effect 60 days after the final report is released. This crucial 60-day period is provided so that the Congress would have the opportunity to take legislative action if it deems such action necessary.

THE BILL'S POTENTIAL IMPACT ON HOUSING

Let me now outline some of the major areas of regulatory influence currently affecting residential development. These few examples are intended to demonstrate the very real and positive impact that the implementation of H.R. 994's review/"sunset" procedures could previously have had -- and can still have prospectively -- at the Federal agency level.

WETLANDS

The rising price that working Americans pay for housing is often directly related to the increasing cost of government regulations for impact fees, zoning permits, hook-up charges, and a host of Federal, state, and local government permits, including Federal wetlands permits. Unquestionably, the burdensome Federal regulation of wetlands has created significant problems for home builders and property owners. Some builders have faced waits of

two to three years to obtain a federal wetlands permit to build on their land. Others end up spending hundreds or even thousands of dollars in legal and engineering fees to clear the permit hurdles to build on "dry wetlands."

The history of wetland protection is rocky at best. When the Clean Water Act was first passed in 1972 and amended in 1977, the statute did not mention the word "wetlands." Only later did the Federal agencies of jurisdiction interpret statutory references to the "waters of the United States" to include wetlands. The Act gave oversight of its Section 404 to two agencies, the Army Corps of Engineers (the Corps) and the EPA. Rather than taking advantage of the best the two agencies had to offer, the bifurcated administrative structure of the Section 404 program has fostered 18 years of controversy and excessive permit processing times.

Much of the controversy of recent years has resulted from the inability of the Corps and EPA to develop mutually agreeable policies which protect the nation's waters and wetlands. These policy disputes have left permit applicants, like home builders, without any meaningful guidance on key program standards for years. Then, lacking any further direction from Congress, the Corps and EPA have systematically engaged in a practice of making policy decisions behind closed doors, without the benefit of public notice and comment. These decisions have resulted in vast amounts of land being inappropriately classified as federal jurisdictional wetlands, regardless of their value or importance as ecologically sensitive areas.

When builders are denied federal wetland permits or forced to wade through needless wetland regulatory bureaucracy, a significant price is paid by the small businessperson and consumer alike. Not only do home builders suffer, but the ripple effect of these actions impact a wide array of subcontractors like electricians, plumbers, and painters. In addition, the ripple is felt by realtors and retailers on Main Street who fail to capture revenue from the sale of drapes, furniture, wallpaper, or other home essentials.

ENDANGERED SPECIES ACT

In 1973, Congress passed the Endangered Species Act (ESA) making it a federal offense to buy, sell, possess, export, or import any species listed as endangered or threatened or any product made from such a species. The law also directed federal agencies to ensure that their actions, including the granting of construction permits to private companies, did not jeopardize listed species. Economic impact was prohibited from being considered when making these determinations.

In 1989, Congress by-passed the opportunity to reform the ESA in a meaningful manner and essentially "rubber-stamped" the Act for an additional five years. The Secretaries of Interior and Commerce have principal responsibility for administering the Act (Interior is responsible for freshwater and land species). Within Interior, responsibility for implementing the Act and for making listing decisions has been delegated to the Director of the Fish and Wildlife Service (FWS).

Preservation groups and "no-growth" advocates have discovered that the ESA is an effective tool to halt development and home construction. In recent years, a temporary restraining order by a federal judge blocked government timber sales from lands involved in the much-publicized spotted owl dispute. The result -- a corresponding volatility in lumber prices. Regrettably, this price unpredictability has had the residual effect of damaging housing affordability. But beyond being used as a "surrogate" to achieve environmental objectives other than the protection of endangered species, ESA listings have also had a major cost impact on municipalities and private builders.

For example, the city of Austin, Texas was recently beset by the ESA listing of the black-capped vireo and the golden cheeked warbler. The FWS has listed both birds as endangered, with the Texas "Hill Country" surrounding Austin the primary center of their habitat. Because there are less than 1,000 birds nationwide, the FWS has taken an especially strong stand. So Austin city officials, in conjunction with the private sector, have devised a conservation plan that sets aside large tracts of land as a protective preserve, with more than 200,000 total acres being required for their protection.

Although the costs of these requirements are difficult to assess, the city's chief appraiser stated that the value of the affected land would be reduced from approximately \$336 million to \$15 million, with the annual tax levy reduced from \$6.7 million to around \$300,000! Beyond the proposed set-aside, the appraised value of the average home in Austin dropped from roughly \$71,000 to \$68,000, with the city forced to deal last year with a \$1.6 million shortfall based on the affected property tax rate.

Officials in Riverside County, California also became mindful of similar dangers in the face of an ESA listing for the Stephens' kangaroo rat (indigenous to that area). The designation slowed on-line development there for more than two years and cost builders more than \$20 million in special environmental fees to help save the rodent and its habitat.

A majority of builders believe there should be a more rational approach to the protection of endangered species. Accordingly, the Congress should examine possible ESA amendments that would require: an economic impact statement to accompany a proposed listing for a species; a determination that a species is recoverable before the final listing of a species; and, an equitable financial responsibility for habitat conservation plans rather than tapping building fees as the primary source of revenue.

OCCUPATIONAL SAFETY AND HEALTH

Much attention in recent years has also been focused on improving safety and health conditions within the construction industry. Indeed, the federal Occupational Safety and Health Administration (OSHA) "rule book" for construction weighs in at nearly 600 pages, with recent standards concerning the hazardous communication of toxic chemicals (HazCom), proper trenching, the use of stairways and ladders and fall protection having all been promulgated in the past several years. No small business owner should be faced with government regulations of that length and detail and be expected to comply with a multitude of regulations from other federal, state and local agencies.

Unfortunately, current OSHA construction standards make absolutely no distinction between a small home building/remodeling site and a major industrial or commercial/public works project. Obviously, the hazards posed by these construction sites are substantially different. Several of these specific standards, including those dealing with excavation and trenching, the use of stairways and ladders, and fall protection and scaffolding, have proven to be particularly difficult and sometimes impossible for home builders to comply with during all phases of house construction.

Some state legislatures in "state-plan" OSHA states have considered creating separate residential construction standards to reflect the profound differences between heavy commercial and light construction. Consequently, most residential builders believe that the Congress should direct federal OSHA to simplify its construction rules, specifically for construction of four stories or less to make them economically and technologically feasible without reducing safety for employees.

Consider OSHA's excavation requirements. During the installation of drain tiles and waterproofing activities, many subcontractor employees may have to enter an unprotected trench. The trench is created after the basement/foundation wall -- either blocked or poured -- is installed inside the original excavation. In many cases, there is no way to protect the trench from caving in due to space limitations on the lot or the protections themselves would block the waterproofing work.

Reasonable trenching and excavation precautions are absolutely necessary on a construction site; however, OSHA excavation regulations should not force a period of non-compliance and create liability exposure for residential builders because of the impossibility of compliance.

OSHA's HazCom rules require that builders maintain Material Safety Data Sheets (MSDS) on literally hundreds of hazardous substances and provide training for all workers on the construction site. Many citations have been issued to builders because of the simplicity of checking for the presence of the MSDS forms and whether or not workers have been trained. The problem is that builders work primarily through subcontractors and therefore do not have direct control over the workers. If a subcontractor changes its workforce and does not train them, the builder is left with the exposure to liability. Yet OSHA has not written -- or rewritten -- its requirements in a form that recognizes the way residential construction is run.

OSHA's fall protection requirements were recently revised and the new requirements put into effect in February. The revised rule contains several stringent requirements that will greatly impact the way homes are built around the nation. The requirements affect any construction employer who has workers exposed to potential falls greater than six feet.

The residential construction community asked OSHA to set the fall protection requirements for potential fall distances of eighteen feet or more. If this request had been accepted, OSHA would then be able to target its energies on the most dangerous situations and operations. However, under the sweeping six foot rule, even the most minor hazards will result in thousands of dollars spent to complete needless paperwork in order to achieve compliance.

The requirements currently require a fall protection plan (FPP) for all circumstances when conventional fall protection systems (harnesses, lifelines or guardrails) cannot be used to protect against fall hazards. The FPP has to be specific for each jobsite and requires considerable written justification for builders to be able to utilize alternative safe work practices.

Unfortunately, during a large portion of roof construction, specifically truss erection and sheathing operations, there is no stable place to put an anchorage point for a lifeline and the walls of the house are not stable enough to support a catch platform. In other words, for every house built that falls under this standard, the builder will always be in noncompliance for a period of time.

The impact of this regulation is potentially the most sweeping in the history of home building. Compliance with this regulation will require, in some cases, a significant increase in the costs to build a home. The required fall protection equipment, the written provisions, and the training requirements are extreme in comparison to other rules that affect construction.

CONCLUSION

Simply stated, Mister Chairman, the passage of H.R. 994 would compel the Congress to fulfill its proper role as the oversight body for all Federal regulatory agencies. Those same agencies would be required to take a regular, meaningful inventory of their regulatory authority -- including these few examples areas I have outlined here today -- and congressional authorizing committees would be obligated to make sure that the agencies are properly interpreting congressional intent and regulating within proper statutory guidelines.

This concludes my written statement, Mister Chairman. For the reasons stated in my testimony, I strongly encourage this Subcommittee -- and the full Congress -- to seek passage of H.R. 994 as quickly as possible.

Mr. MCINTOSH. Thank you very much, Mr. Mashburn. I appreciate all of you traveling here to be with us today. One of the goals that I've set out for our subcommittee is to hear testimony from Americans outside of the Beltway to see the effects of Government regulatory programs on their lives and in their businesses. And I appreciate you bringing that forward. Your information will be very helpful to us as we move this legislation forward and undertake other areas of oversight by this subcommittee.

Let me ask you a couple questions, which you may not be able to answer here today. But I might enlist your help in going back and making some of the determinations and perhaps supplementing the record. The first one is in the area of costs of Government regulations. And I was wondering if you could share with us an estimate of what percentage of the cost of the product or the service you're providing is a result of these unnecessary regulations.

And then another way to look at the cost is, perhaps you've foregone opportunities to expand your operation or increase employment. And so there would be either job loss if you've had to lay people off, or failure to create new jobs because, frankly, the regulations wouldn't allow you to make it, on a cost benefit basis, to determine that it was worth your while to expand in certain areas.

I wanted to check with each of you if you had some idea of that, and if it would be possible perhaps, working with some of the organizations you're representing, to give us that information that we can try to bring it home to people. For example, if you go into a grocery store, what percentage of the cost of the food there is due to Government regulations and things like that.

Let me just go through, perhaps in the order that you testified, and see if you have any thoughts in that area, or perhaps need more information before you can answer.

Mr. BECHTEL. I would hazard a guess that the productivity level of the fall protection standards on single family housing and roofing projects is going to cost approximately 25 percent more in labor, which would result in about 15 percent more in total cost of the roofing project.

Mr. MCINTOSH. From that one regulation alone.

Mr. BECHTEL. Please?

Mr. MCINTOSH. From just that one regulation?

Mr. BECHTEL. That's correct. I might also add that along with that, that when you put this fall protection, this 6 foot, into place in residential roofing projects, anything up to a 6 to 12 slope, and these men are in harnesses and ropes, these men are still going to scurry around that roof like they were walking on the ground, because they're comfortable with it.

They're not going to pay attention to whose rope they're stepping over or whose rope they walked under or how they go back to where they were to get the materials and equipment, et cetera. So when one of those slips, and he causes the next man to go, sooner or later, somebody is going to get their neck snapped handling a rope. And then we're really going to have a problem.

Now, when you get over 6-12 and you put ropes and harnesses on these guys, they automatically can see that there's a problem when they're over 6-12 anyhow. So they do pay attention to every

move they make. It's like if I put you on a 2-foot plank here on the floor. You're not going to pay any attention to how you walk across that plank. But let me raise it 30 feet from the ground, and I guarantee you, you're going to be very cognizant of every step you make and possibly every breath you take.

They're just aware. Up to 6 and 12, forget it; they're walking on the floor, these guys. It would take 40 years to retrain the work force to comply with this harness thing up to 6-12.

Mr. MCINTOSH. So in addition to the economic costs, you actually foresee some incidence of greater safety hazard.

Mr. BECHTEL. Absolutely on low slope projects, because they don't pay attention to how they cross each other.

Mr. MCINTOSH. Thank you. Kaye, any estimate of costs for your farming operation?

Mrs. WHITEHEAD. No. One thing that I would point out is that production agriculture does not have the capability to pass along these costs. The regulations that we're talking about today are absorbed by those of us that are on the farm, because our price—unfortunately, we don't get to dictate our price. So I guess I would not, at this point, giving you a percentage of the product and so forth.

But I would like to point out that regulations have impeded upon private property rights. And that's certainly an issue in the farming community. And along with that frame of mind, you ask in the second part of your question about expansion of operations, or the ability of operations to expand. Are they limited by government regulations? And I would suggest that, indeed, they are.

In fact, many of your family farming operations are at a crossroads where they must decide if they can become large enough to be able to meet the regulatory requirements. We're finding that a lot of people are selling out to corporate entities because there's no room for them, there's no future for that next generation. So I would have to work with you on getting a percentage of cost for what we produce.

But I think there's other aspects of regulation that are unfunded mandates that we're looking at here.

Mr. MCINTOSH. Thank you. Mr. Dean.

Mr. DEAN. Well, sir, in the arena of natural resources and timber, especially after the administration had its timber summit on the West Coast a couple years ago, which I volunteered to participate in, but wasn't invited, Mr. Gore—they strengthened the ESA regulations out there in relation to the Spotted Owl. And the immediate result of that was that lumber prices in the United States just about doubled.

They went from a composite price index of 200 to a composite price index of 500, and then they've settled back down just under the 400 level right now. But with the doubling of prices, unfortunately, we have the same problem in dealing with a commodity type market; we don't get to dictate our prices either. Our stumpage in the South has gone up almost three times in price, or cost to the producer.

So this is good news for the landowner, but it's bad news for the consumer. And the short run downside to that is that while we're protecting all these trees out in the West for the owl, the private

lands in the South are being raped by the same companies that you see running T.V. ads saying they're protecting us, because they're not being governed down there.

So I'm not advocating anymore Federal regulations. I think we need to regulate ourself a little bit better. As far as foregone opportunities, I know that we have not gone into several businesses in the last 2 or 3 years; one, specifically, because we were afraid of what was going to happen with health care, that we chose not to buy a business opportunity that came along.

And several times we've chosen not to expand because of the threat of either additional Federal regulation or the threat of litigation that we're under or other types of safety regulations. So we have been definitely impacted.

Mr. MCINTOSH. Thank you very much. Mr. Burgin.

Mr. BURGIN. As far as cost goes, in the last 5 years, I have spent over \$11,000 per location for new regulations that come on almost every year. Most of which this \$11,000 is recurring annually. By 1998, I have to have my tanks upgraded. And depending on what tanks you have in the ground at the time, my cost will be \$30,000 to \$100,000 per location.

Mr. MCINTOSH. What's your average volume of business in a year at one of those locations?

Mr. BURGIN. I do about a million gallons of gas a year.

Mr. MCINTOSH. At each location?

Mr. BURGIN. Yes, sir. Part of these regulations were good. At one time, it was years ago, I could have had an underground leak and not known about it for a good period of time. They started these regulations—and I can have a leak today, but I'm going to know about it within the day. The problem is, is they regulate us, and it wasn't all bad.

They just keep regulating and regulating more and more, where we just cannot function. The days of having a leak for a long period of time and really polluting the soil are history because of the initial regulation. Now they just add on to it. They want to never, never have a leak. I mean, you always have a possibility of a freak leak, hopefully you never do.

But if you do, it's going to be found quickly and rectified. As far as any other information, dollars and cents wise, the National Association of Convenience Stores here in Washington has the information, the true information that I might not have.

Mr. MCINTOSH. That would be very helpful. I might enlist your help in contacting them.

Mr. BURGIN. I'd be glad to. The other thing is, being in business for yourself used to be fun. Government has just taken the fun out of being in business.

Mr. MCINTOSH. I have a good friend in Muncie who came up to me when I first met him and said, my biggest enemy, as a small businessman, isn't the foreign competitor and it isn't my competitor down the street; it's Uncle Sam who's making life very difficult because of all the red tape and the regulations that he has to live under in his business.

So I appreciate, exactly, your sentiment. Mr. Mashburn.

Mr. MASHBURN. Mr. Chairman, with regard to costs, and while it seems like this panel has zeroed in on basically three things,

there's a lot of other regulations that affects the homebuilding industry that compound the ultimate sale price of our homes. And the National Association of Home Builders either has or will be glad to furnish some relationships and some costs with regard to what it's doing to the homebuilding industry.

Unfortunately, when we're talking in terms of sale price and while, yes, in the free enterprise bit, I can charge anything I want to for the ultimate product that I'm building. But the problem is affordability. So I'm no different than the rest of the panel when I say I can't really pass those costs on. If I can build them in and there's no one that can afford my home, then I've got a home that nobody can afford.

And so it's really a catch-22 with regard to, well, gee, you aren't regulated on how much you want to sell your house for—and I'm not proposing that anybody regulate me on that, by the way.

But it is, unfortunately, where it's hurting the most, these regulations and the additional cost, is helping the citizens of the United States reach that first rung of the home ownership ladder, because the affordable housing area is being hit and impacted much more drastically than a half a million dollar home that's got another \$3,000 or \$4,000 on it. And that's the sad thing.

With regard to expanding, I think I explained to you, I made the conscious decision in 1990. And frankly, it was because of not the cost benefit, but the risk benefit. I had 20 very good years, the 1970's and the 1980's. Certainly in my business, you could make some money and you could lose some money. But from the 1990's on, it just was the last straw that broke the camel's back. There seems to be more of a tendency that you could lose what little bit you've been able to acquire.

And the benefit of making the profit that we all are in the business for was diminished. So we chose to go out in an organized manner. I mean, I'm still involved in it, but not to the extent of the employees that I had at one time.

Mr. MCINTOSH. So regulations essentially drove you to take your investment and put it into safer forms, a bank account or whatever you've done with it, and not risk it in job creation and wealth creation.

Mr. MASHBURN. That's exactly correct. We were talking, just as another example of the risk, is, suppose that I was looking at a piece of dirt that this gentleman happened to have a service station on many years ago. And nobody remembered and they didn't have leak detectors and et cetera, and my attorney forgot to make sure that we got from the previous owner a test to make sure that soil was good, and I buy the land.

And then somebody comes along—I mean, I am faced with tremendous expense to excavate that contaminated soil out. And 20 years ago, nobody was even talking about that. Now, have we improved our society because somebody now is going to make me dig out some dirt that's been there, contaminated for 20 years? I submit to you that this is the overregulation that we're talking about.

But let me wind up in one thing, because I think we've all been kind of slamming the system. I think we all agree that we're still living in the greatest country in the world. We've got more opportunities than anyplace else. I wouldn't swap it for anything in the

world. But when you look back and say, 20 years ago and now, have we really improved that quality of life, either in the business atmosphere or in our society?

I think we need to take a look at it. And I commend this committee, because I think this is what you're trying to do with H.R. 994. Thank you.

Mr. MCINTOSH. And I think Mr. Burgin expressed it well. There are some regulations, particularly some of the initial ones, that made sense. They protected the environment in a sensible way. They helped with health and safety. But what we've seen, particularly in the most recent history is, they've gone way too far and had really negative consequences for all of us.

Thank you all. Those are the only questions I have. Mr. Gutknecht, do you have any questions for the panel?

Mr. GUTKNECHT. Well, Mr. Chairman, I really don't have a question so much as a comment, and, first of all, a thank you to these witnesses. This has been excellent testimony. The comment I would make, though, I think Mr. Waxman asked for additional days of hearings. I only wish that more of our friends on the other side would have been here to hear this testimony, because these are the folks that have to deal with these regulations day in and day out.

And unfortunately, we're going to have, perhaps, another day of testimony. And if we are, I think we ought to require attendance, so that people actually have to hear what small businesspeople, farmers and others are having to deal with every single day. And I think this is an important bill. I think the authors have done an excellent job of presenting it. And the testimony here today has been well worth the investment of our time.

Mr. MCINTOSH. Thank you very much, Mr. Gutknecht. Thank you all for coming. I really appreciate it. And that information will be very valuable to us. Let me turn now to the final panel, for an opposing view. Mr. David Vladeck is here. Mr. Vladeck, thank you for coming and joining us here today. Let me, before we get started, ask you, do you work with Mr. Alan Morrison?

Mr. VLADECK. I do.

Mr. MCINTOSH. I worked with him a long time ago when I was representing the Justice Department at ACIS, and got to know him a little bit there. Please give him my best.

Mr. VLADECK. I shall. And I, too, am a member of the Administrative Conference. And I hope perhaps your prior association with the Administrative Conference will hold it in good stead when it's up for reauthorization.

[Witness sworn.]

Mr. MCINTOSH. Thank you, Mr. Vladeck. Please share with us your views on this legislation.

STATEMENT OF DAVID VLADECK, DIRECTOR, PUBLIC CITIZEN LITIGATION GROUP

Mr. VLADECK. Well, first of all, let me commend you for both taking up this matter and for your tenacity here today. This has been a long session, and I'll try not to keep you much longer. Let me start out by simply acknowledging that I think there's a unanimity as to the aspirational goals that this bill tries to put forward, and that I think every witness before you today has agreed to; which

is that we need a mechanism in place that efficiently reviews regulations to ensure that they're not obsolete, they're not outdated, they do not impose needless burdens on regulated industry.

But—and here's the but—I do not think H.R. 994 is the right way to do it. And I think there are several serious flaws in this approach, which really, in my view, commend this committee to taking a fresh look at this issue. The first is, I think you need to craft legislation that dovetails more efficiently with what the administration is doing. And I recognize that there have been prior attempts by the executive branch, as you, I'm certain, know from your days in the Bush administration, to review regulations in a comprehensive way.

But it is my observation that there is an unprecedented commitment by this administration to do that. And you will know by June 1 at least the first cut of what the administration's product is. And I would urge that before you go ahead and legislate in this arena, you take a hard look at what fruit, if any, the administration has managed to pick on this. And if, in fact, the administration's approach is working, you may be able to learn a lot about the best way to legislate, simply by trying to replicate the best features of the administration's program and add on whatever additional tools that you think are necessary.

So in part, I urge you to wait very shortly until the returns are in. The second thing is that I think H.R. 994 is way overbroad. It's overbroad in many respects, and it's overbroad in a way that's going to undercut its effectiveness. What you need, and what you're hearing today, is some mechanism to communicate with the public about what rules are really causing problems and which ones are not.

I think that it is hard to imagine that the securities community is going to come here with a plea that rule 10(b)(5) in the securities rule or 10(k), the disclosure requirements, are somehow off base. But your statute treats that the same as the wetlands rules, which are the source of such friction. And one of the things that I think you ought to have confidence about is the ability of people who are subject to regulation to voice their concerns about which regulations don't make sense.

The APA already has a petition mechanism. Maybe it's been underutilized. The Administrative Conference did a fairly exhaustive study of that petition mechanism and reached several conclusions that you ought to take a look at; one of which is that it is underutilized. Maybe part of the answer is to strengthen that to set time limits to enhance judicial review. Judicial review is already available. But Congress thinks that you need to get more teeth in it.

Selectivity here is an important tool because if you ask agencies, as H.R. 994 contemplates, to go through not only every substantive rule, but every interpretive rule, every guidance document, in essence, every piece of paper they've ever issued giving advice to anyone, you have created a recipe for gridlock. Agencies will be spending millions and millions and millions of dollars engaged in a monumentally wasteful task.

That does not achieve the goal that you set out to achieve, which I agree is a laudable one, and certainly is not going to grant the

kind of relief that the panelists before me are urging to get from you. And so let me identify some areas that I think you ought to take a look at. One are rules that are connected to statutory mandates. If the Food and Drug Administration tomorrow thought that the rules promulgated under the Nutritional Labeling and Education Act were bad, what could they do?

They're under a statutory mandate to continue those. Those are your responsibilities. Those are Congress' responsibility. And one of the things that I find striking is, many of the rules that generate the most friction are rules that were not created at the agency's initiative. They're rules that were created pursuant to a clear-cut statutory mandate created by Congress.

And if those rules should be revisited, it makes no sense to have the agencies revisit them. This body has to do it. And to tell the FDA that it has the obligation to somehow go out and repeal the NELA rules that you've directed them to issue, strikes me as being a not worthy endeavor. The second thing I would urge you to do is take a look at interpretive rules.

It may be true that some of the friction points that you've mentioned come from interpretive rules. But as you know and as I know, interpretive rules are not supposed to have a binding impact. I realize the DC Circuit has said the difference between an interpretive rule and a substantive rule is an enigma shrouded in considerable smog. And oftentimes there's a difficulty figuring out which is which.

But do you really want the U.S. attorney's office to go through its enforcement manual every 7 years? Do you really want the SEC to go through all the advice it gives to accountants about how to do audits? Those are enormously complex documents. They are plainly interpretive rules, and industry needs them.

One point that ought not to be lost here is that many of the interpretive documents that are created are created in response to a legitimate need on the part of regulated industries to have clear-cut instructions from regulated industry. And one of the things that you're missing today, but I think you really need to appreciate, is how much demand regulated industry creates for these kinds of guidance documents.

I was a participant in the formaldehyde rulemaking. And there's a large guidance document that was prepared to help regulated industries comply with that standard. They insisted on it. They wanted it, because they wanted certainty, and they have relied on it. And the reliance interest that developed with respect to some of these rules is quite considerable.

I have two more brief points. I see my time has expired, but let me hurry through two last points. One is, I understand the need to set forth some criteria. But I think that H.R. 994 suffers from many of the same defects that critics of the regulatory process use. It's overly prescriptive; it's highly burdensome; and it will generate enormous amounts of paperwork.

I don't see any reason why the committee needs to go beyond directing agencies to look at their rules to make sure they're not obsolete; they're not cost-inefficient; that they continue to serve legitimate and important purposes. But the problem with H.R. 994 is, you're required agencies, for every rule—no matter how modest, no

matter whether it's a consensus rule, no matter whether it's the product of negotiated rulemaking—to prepare very elaborate documents, analytical documents, that they will prepare in great detail because it's tied to the judicial review provision.

There is a broad judicial review provision here. And if I'm an agency bureaucrat, I am going to prepare a lengthy cost benefit assessment not necessarily because I'm going to need it to convince you, but because I am worried that your colleagues who sit down at the DC Circuit or in the DC District Court are going to say, well, your cost benefit analysis here is inadequate; Congress plainly intended you to do more, and therefore, I'm going to set aside whatever it is you've done.

Last, the judicial review provision brings into sharp focus the lack of harmony between this bill and the rest of the Administrative Procedure Act. If you intend to repeal most of the notice and comment provisions at the EPA, you should do so forthrightly and directly, not through the back door, the way this bill does. Under the APA, the public has a right to participate in modifications or terminations or repeals of rules.

And paradoxically, although this bill is being portrayed as a bill to enlist the public's assistance, in fact it freezes the public out when rules are being modified or terminated. And that seems to me, is antithetical to the approach the Administrative Procedure Act has always taken. And I don't think that was the consequence or the intention of this committee to do that, but I think much greater attention needs to be paid to how you fit in these kinds of reviews with the basic procedures set forth in the APA.

You've been very indulgent, and I thank you for giving me a couple of extra minutes.

[The prepared statement of Mr. Vladeck follows:]

**Statement of David C. Vladeck, Esq.
Director, Public Citizen Litigation Group
Before the
House Committee on Government Reform and
Oversight
Subcommittee on National Economic Growth,
Natural Resources, and Regulatory Affairs
On H.R. 994
The Regulatory Sunset and Review Act of 1995**

STATEMENT OF DAVID C. VLADECK, ESQ.
DIRECTOR, PUBLIC CITIZEN LITIGATION GROUP
BEFORE THE HOUSE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT
SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH, NATURAL RESOURCES,
AND REGULATORY AFFAIRS
ON H.R. 994, THE REGULATORY SUNSET AND REVIEW ACT OF 1995

March 28, 1995

Mr. Chairman and members of the Committee, thank you for the opportunity to testify this morning on H.R. 994, the Regulatory Sunset and Review Act of 1995. Before I turn to my substantive remarks, let me briefly sketch out the basis for my interest in this matter.

I am the Director of Public Citizen Litigation Group, the legal arm of Public Citizen, Inc., a nationwide advocacy organization of over 100,000 members that has long been active in regulatory matters in general, though with a special focus on health and safety issues. Among other things, for more than twenty years we have represented consumer groups, labor unions, worker groups, and public health organizations in standard-setting proceedings and in litigation involving the OSHA, EPA, FDA, USDA, NHTSA and other health and safety agencies. Public Citizen is also a charter member of Citizens for Sensible Safeguards, a broad-based coalition of consumer, environmental, civil rights, labor, and health care organizations opposed to legislative proposals that would undermine federal safeguards. (Citizens for Sensible Safeguards' Statement of Principles and membership list are attached).

Public Citizen's first-hand experience with the regulatory process gives us a real-life appreciation of the way our system now operates. It also allows us to comprehend the breathtaking,

radical, indeed, unprecedented changes that are proposed in H.R. 994 -- changes that will threaten the ability of agencies, especially those charged with protecting the public's health and safety, to do their jobs effectively.

Public Citizen has no quarrel with the basic insight that animates this bill; namely, that agencies should periodically reassess the continued need for, and cost-effectiveness of, their regulations. Outmoded regulations serve no one's interest, but instead dissipate resources that could be better spent elsewhere. Thus, we have no objection to the idea that agencies should be compelled periodically to reassess their existing regulations. Indeed, President Clinton's Executive Order on regulatory reform mandates that agencies do just that.

We strongly oppose H.R. 994, however, because in our view it is so onerous, so sweeping, and so prescriptive and burdensome in what it requires, that it will drain a considerable amount of scarce agency resources for little benefit. It is indeed ironic that, although this very subcommittee is a major proponent of cost/benefit analysis, it would consider legislation that would plainly fail -- and fail resoundingly -- any cost/benefit test. H.R. 994 will impose heavy costs on agencies, but the benefit that will accrue as a result of the H.R. 994 review process is, at best, marginal. We urge Congress to carefully consider the impact that H.R. 994 will have on the ability of agencies to perform their vital work before it adds new burdens to our already overworked agencies.

We make three points below:

First, the theory underlying H.R. 994 -- that the current regulatory system lacks adequate controls to assure that agencies periodically reassess the validity of their regulations -- is simply wrong. H.R. 994 ignores the fundamental reality that agencies are already under strict obligations to review their regulations and weed out and prune down those that are outdated, cost-ineffective, or otherwise in need of revision.

Second, H.R. 994 takes a sledgehammer approach to a problem that could be resolved by far less draconian means. For instance, there is no reason why rules compelled by statute are encompassed within H.R. 994 -- yet there is no exception. Nor, for that matter, does it make sense for the Securities and Exchange Commission to regularly review its regulations prohibiting market fraud, or the IRS to review its passive investment rules. Yet they too are subject to H.R. 994's review requirements. Moreover, the review criteria in H.R. 994 are much too onerous and prescriptive. A far simpler mandate to agencies would achieve Congress' goal equally well, without generating mounds of paper and imposing enormous make-work requirements. And the judicial review provision in H.R. 994 means that agencies will be forced to commit a growing portion of their resources to defending their actions in court.

Third, H.R. 994 flunks any rational cost/benefit test. While it will impose staggering new costs on agencies already reeling from budget cuts, the benefits that flow from H.R. 994 will be modest by any measure. After all, H.R. 994 adds little in terms of

compelling agencies to review their existing rules; it adds volumes in terms of the burdens of that review.

I. The Theory Underlying H.R. 994 Is Simply Wrong.

The first, and most glaring, problem with H.R. 994 is that it rests on a flawed premise. H.R. 994 wrongly assumes that, at present, there are inadequate mechanisms for self-correction built into the regulatory structure and that reform is needed to add such a mechanism so that outmoded regulations do not languish on the books. That view overlooks at least three controls already in place that impose substantial discipline on agencies.

1. To begin with, President Clinton's Executive Order on Regulatory Planning and Review, E.O. 12,866, explicitly mandates that each agency establish a program "under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated so as to make the agency's regulatory program more effective in achieving the regulatory objectives, [or] less burdensome" Section 5. Agencies have complied with this directive, e.g., 59 Fed. Reg. 3043 (Jan. 20, 1994) (FDA's proposal for comprehensive review of its existing regulations) and are at work as we speak reviewing their stock of existing rules to ensure that they are not out-of-date.

The President's initiative, however, is not solely dependent on the agencies to conduct these reviews. Rather, the Executive Order designates the Administrator of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget

(OMB) to oversee the government's efforts to repeal or modify outdated rules. And the Administrator is directed to work with outside parties, such as industry, labor unions and consumer groups, and with state, local and tribal governments, to identify regulations that "impose significant or unique burdens" or that "appear to have outlived their justification or be otherwise inconsistent with the public interest." Through this provision, the President has literally invited anyone dissatisfied with an existing regulation to take his or her case to the Administrator of OIRA, an official with enormous clout whose mandate is to ensure that regulations do not place needless burdens on regulated entities or the economy.

Moreover, as an additional expression of the Administration's commitment to streamline the administrative process, the President has ordered every agency to conduct an "inventory" of its existing rules for the purpose of identifying those in need of modification and repeal. In his remarks of February 21, 1995, President Clinton "instruct[ed] all regulators to go over every single regulation and cut those regulations which are obsolete." He further directed that every agency issue a report to be unveiled on June 1, 1995, identifying regulations which need to be modified or repealed, and legislative reforms which are needed to help streamline the regulatory process. With all of these efforts underway, Congress ought not to jump the gun and impose highly burdensome requirements when it is apparent that the President is committed to the goal of eliminating outmoded rules and is doing so in a responsible,

systematic way. At the very least, Congress ought to stay its hand and allow this President adequate time to clean his own house.

2. Even apart from the President's considerable efforts in this regard, the Administrative Procedure Act contemplates that the public will play a pivotal role in monitoring the continuing vitality of existing rules. 5 U.S.C. § 553(e) provides that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." Most agencies have promulgated regulations explaining to the public how to go about filing petitions for rulemaking. See Luneberg, *Petitions for Rulemaking, Federal Agency Practice and Recommendations for Improvement*, 1986 ACUS Recommendations and Reports 493 (setting forth agency procedures implementing § 553(e)). Many substantive enactments build on this requirement by establishing procedures for citizen rulemaking petitions and placing strict time limits within which the agency must respond. E.g., Toxic Substance Control Act, 15 U.S.C. § 2620; Medical Device Amendments of 1976, 21 U.S.C. § 360c(b). The whole point of these provisions is to enlist the public's assistance in identifying those rules that have either outlived their usefulness or are in need of overhaul. To give these provisions teeth, courts review agency denials of rulemaking petitions, and, in appropriate cases, compel the agency to act. E.g., *Public Citizen Health Research Group v. Aucther*, 702 F.2d 1150 (D.C. Cir. 1983). Thus, any suggestion that there is a gap in existing law which inhibits the ability of regulated entities to force agencies to grapple with claims that their

regulations are out-of-date or are no longer cost-effective is groundless.

3. Finally, there is another, perhaps more subtle, reason why agencies themselves have a strong interest in repealing archaic or out-of-date rules. Regulation is a two-way street, imposing costs and obligations on both the regulated entities and the agency. Regulations are expensive to enforce; compliance is costly to monitor. Above all else, agencies do not want to squander their meager resources on regulatory programs that are outmoded. Equally important, agencies have a powerful stake in breeding respect for the law so that regulated entities obey the rules the agency enforces. Keeping archaic and out-of-date rules on the books can only generate contempt. Thus, sensible regulators have every incentive to ensure that their regulations are kept current.

II. H.R. 994's Sledgehammer Approach Is Unwarranted.

Not only is H.R. 994 aimed at a problem that is already being comprehensively addressed, but it takes a sledgehammer approach to deal with an issue that could be resolved with far less oppressive procedures. H.R. 994 takes an extreme -- indeed radical -- approach in several ways.

1. At the outset, it is apparent that H.R. 994 is grossly overbroad in its sweep. There is no reason why all agencies should be required to review all of their rules on a fixed schedule. For one thing, there are many categories of rules for which this kind of periodic review is superfluous.

Foremost among them are regulations that are imposed pursuant to statutory directives. It makes no sense for the Administrator of the EPA to review regulations that Congress has mandated under the Clean Air Act Amendments of 1990 as part of H.R. 994's sunset review. Nor should the FDA have to review its regulations under the Nutrition Labeling Education Act of 1990, or the Justice Department and EEOC review their regulations under the Americans With Disabilities Act, every few years. These regulations, more than anything else, reflect statutory judgments made by Congress. To the extent that periodic reconsideration of these rules is warranted, it ought to be conducted by Congress as part of the reauthorization process, not by the agencies. After all, the agencies are required by law to impose these rules, and only Congress is free to lift the statutory mandate from the agencies' shoulders.¹

For another, there is no reason why market regulation rules need to be reviewed on a fixed scheduled. Is there any sense in having Securities and Exchange Commission regulations reviewed every seven years? Does anyone seriously contend that anti-fraud rules set out in Rule 10(b)(5) need to be reexamined, or that the disclosure requirements set forth in Rule 10(k) should be

¹ Indeed, by compelling agencies to review regulations issued pursuant to a statutory mandate, H.R. 994 contemplates the anomalous possibility that an agency might be compelled to terminate a rule that is required by statute, if, for instance, the agency concludes that the rule is not cost-effective, or is not based on current information. That result, however, may be intolerable for regulated entities, who need precise, clear-cut agency regulations in order to ensure that their conduct does not run afoul of the statute.

reassessed? Does anyone really believe that fraud, manipulation and insider trading will somehow disappear from the stock market in the next seven years and that the SEC's regulatory supervision will no longer be necessary?

This point applies with equal force to a wide spectrum of regulations -- including those imposed by the Nuclear Regulatory Commission, the Internal Revenue Service, the Wage and Hour Division of the Department of Labor, the Federal Trade Commission, the defense contract audit agencies, and legions of others. Periodic upheavals in these regulatory regimes (or even the possibility of upheaval) will do little in terms of reducing burdens on regulated entities. Instead, it will create serious apprehension about whether the government will upset long-standing policies that regulated entities have come to rely upon. That result must be avoided.²

2. Not only does H.R. 994 reach far too many rules, it also review procedures that are far too burdensome. Four provisions are especially problematic.

² Equally problematic is the deliberate decision in H.R. 994 to cover "interpretative rules." This raises at least two problems. First, by casting H.R. 994's net to include interpretative rules, the sponsors have at least doubled or tripled an agency's workload, since most of the guidance an agency provides regulated entities at least arguably falls within that category. Second, by reaching to interpretative rules, the agencies will be forced to engage in sunset reviews not merely for the regulations they publish in the Code of Federal Regulations, but also in virtually every manual or guidance document the agency produces. The increased workload for agencies added by sunset review of interpretative documents will be staggering, which may discourage agencies from giving this sort of interpretative guidance, to the detriment of regulated entities.

A) First is the requirement in section 2(b)(2) that "new" rules, i.e., those that take effect following the enactment of H.R. 994, be subject to sunset after only three years. That time period is much too brief. Indeed, it now takes agencies like OSHA, NHTSA, and the EPA three to five years merely to issue health standards. Because of the complexity of most environmental, automobile safety, and occupational health standards, many of the rules issued by OSHA, EPA and NHTSA have multiple phase-in periods, with long lead times, and "take effect" over the span of a year or more -- an eventuality not contemplated in H.R. 994. If an agency must measure the effective date of a regulation from the date that the first phase of the rule takes effect, then many of the regulations that will be subject to "sunset" and potential termination under H.R. 994 will, in actuality, have been in effect for a very brief time period -- a period far too brief for anyone to rationally take stock of the efficacy of the rule.

To make matters worse, H.R. 994 will condemn an agency like OSHA or EPA, once it has just gone through the laborious and highly resource-intensive task of issuing a rule, to effectively re-review it before the ink in the federal register is even dry. In our view, that simply makes no sense. If "new" rules require this sort of sunset review more quickly than seven years (which we doubt), a period of at least five years from the date the entire rule is in effect would be more sensible and far less invasive.

This problem is compounded by an ambiguity in section 3. As we read the bill, there is at least an argument that a "new"

regulation that is subject to sunset review three years after its effective date is also subject to sunset review seven years after it takes effect. Thus, a new rule would in fact be subject to two sunset reviews within seven years. The illogic of such a requirement is evident. Whatever justification there may be to require a new rule to be promptly subjected to sunset review (and we submit that there is none), there is certainly no reason to single out new rules for such harsh multiple-review treatment.

B) The second problem is with the highly prescriptive and burdensome nature of the sunset review set forth in H.R. 994. An agency confronting a sunset review under H.R. 994's standards will have to virtually replicate the considerations that must be reviewed in rulemaking, and then proceed to examine factors that might not have been evaluated during the initial rulemaking.

In fact, under section 4(b), there are no fewer than 18 separate criteria that must be examined, ranging from the highly general (i.e., "[t]he extent to which the regulation is outdated, obsolete, or unnecessary," § 4(b)(1)), to the extremely specific (i.e., whether the regulation "conflicts with, or overlaps requirements under regulations of other agencies," and whether it is "the most cost-efficient alternative . . . to achieve the objective or the regulation," §§ 4(b)(2) & 4(b)(7)), to the probably undoable (i.e., "the total effect of the regulation across agencies," § 4(b)(14)).

It is hard to estimate the costs to an agency that will be occasioned by these reviews, but they will be considerable by any

measure. For one thing, it will require substantial senior staff time to conduct the review mandated by section 4(b). For another, section 4(b) directs the preparation of substantial analytical documents, which are expensive and time-consuming. Among the most onerous:

- Section 4(b)(3) requires the preparation of an analysis that reviews the "extent to which the regulation impedes competition." Apart from the loaded nature of the question (which ignores the extent to which the regulation stimulates competition), this will require a substantial undertaking by the agency.

- Section 4(b)(7) commands agencies to assess whether the regulation selects the "most cost-efficient alternative" to achieve the objective of the regulation. Obviously this mandate will require agencies to engage in a comprehensive analysis of potential regulatory options, and to assess the relative virtues of each. Again, that is a considerable undertaking.

- Section 4(b)(11) requires agencies to evaluate whether the regulation "maximizes the utility of market mechanisms to the extent feasible." Agencies will have to study the relevant markets and determine whether there are emerging market mechanisms that could substitute for the regulation. This too is a significant requirement.

- Section 4(b)(14) requires agencies to examine the "total effect of regulation across agencies." Apart from the ambiguity engendered by the awkward drafting of this provision, this requirement appears to require agencies to prepare extensive

economic analyses of the specific effects of all of the regulations it imposes, as well as the cumulative impact of regulations imposed by other agencies. It is unreasonable to require agencies to assess the impact of regulations imposed by other agencies.

As this brief summary makes clear, H.R. 994 will force agencies to essentially reinvent the wheel each time one of its rules comes up for sunset review. There is no need for these elaborate procedures or the preparation of extensive analytical documents in every case. For example, why subject the SEC's Rule 10b-5 or NHTSA's passive restraint standard to this kind of review? What reason is there for the NRC to have to reconsider its safety rules every 7 years, let alone to prepare the analytical documents required by section 4?

To be sure, there may be rules that warrant this sort of expenditure of time and money. But it is a dead certainty that the vast bulk of rules need not be subjected to this sort of thoroughgoing reexamination. Unfortunately, H.R. 994 treats all rules alike, regardless of whether they have minor impacts on the economy, they were reached through negotiated rulemaking, they are supported by regulated entities, they are plainly warranted by unabated health or safety threats, or whether industry has developed considerable reliance interests in their continued implementation. And unfortunately H.R. 994 is highly prescriptive. Instead of simply asking agencies to ensure that their rules are not outdated, obsolete, unnecessary, or cost-inefficient, it sets

out a maze of burdensome requirements that will tie agencies in knots.

C) A third problem in H.R. 994 is that it creates a tension with the Administrative Procedure Act that may be irreconcilable. As we read H.R. 994, it contemplates that agencies will be authorized to "modify" existing rules through the H.R. 994 sunset review process. That, however, is incompatible with the APA's mandate that agencies undergo thorough notice-and-comment rulemaking, and the development of a public record whenever an agency wants to modify a rule.

Apart from the fundamental question of how to reconcile these plainly discordant requirements, there is a more substantial question that must be addressed by Congress; namely, whether an agency must incorporate the substantive requirements in H.R. 994 when considering modifications to existing rules? Assume that the EPA had issued Clean Air Act regulations, but, during the course of sunset review, concluded that those regulations needed to be updated. Under H.R. 994, is the EPA bound to consider cost/benefit factors -- even though the courts have made quite clear that cost/benefit may not be a decisional criteria under the Clean Air Act? We assume that the sponsors of H.R. 994 are not trying to tie the EPA in a Gordian knot, but that is precisely what H.R. 994 will do if this key issue is not clarified.

D) Finally, we urge this Committee to take a hard look at the judicial review provision of H.R. 994, which is an open-ended invitation to mischievous litigation by those intent on either

diverting agency resources or who want to challenge the validity of a rule that is being extended, even though they could have challenged (and maybe did challenge) the rule when it was first issued.

Make no mistake, the judicial review provision in H.R. 994 creates unprecedented opportunities to wreak havoc on agencies. It allows those unhappy with a particular regulatory requirement multiple opportunities for judicial review -- no less than once every seven years. Given this opportunity, the most recalcitrant companies will resurrect their challenges to rules time and again, though dressing up their complaints in the language of section 4 of H.R. 994. Thus, for example, a company that wanted to be relieved of its disclosure obligations could sue the SEC every seven years challenging Rule 10K on the ground that it failed to "maximize[] the utility of market mechanisms to the extent feasible." See § 4(b)(11). Under our legal system, everyone is entitled to one bite at the apple; but only one. This proposal breaks new ground by giving disgruntled companies many bites at the same apple. Doctrines of *res judicata* and estoppel that ordinarily prevent multiple litigation on the same issue are stripped away by H.R. 994. That is not sound policy, and the endless rounds of judicial review authorized by H.R. 994 will drain away scarce judicial and administrative resources.

III. H.R. 994 Flunks Any Reasonable Cost/Benefit Test.

The drafters of H.R. 994 have also shown an alarming insensitivity to the question of costs. In this era of budget-

slashing, this oversight is hard to fathom. The undeniable fact is that compliance with the analytical requirements imposed by section 4 will be extremely expensive -- running into costs of several hundreds of thousands of dollars for each rule. By way of illustration, the regulations of the SEC fill two volumes of Title 17 of the Code of Federal Regulations, running over 1300 pages. Within those pages are literally hundreds of regulations -- and the SEC is small potatoes compared with the IRS. The costs to the SEC in simply keeping up with the enormous paperwork requirements of H.R. 994 will be substantial.³

On the other hand, the benefits that will likely flow from enactment of H.R. 994 are marginal, at best. As I have already explained, comprehensive -- though far less burdensome -- efforts are already ongoing to identify and weed out those rules that impose unreasonable costs on the economy. The incremental value of H.R. 994 is hard to measure since the President's program is only in its first phase, but is likely to be small since H.R. 994 largely duplicates the mandate set forth in E.O. 12,866.

Under these circumstances, H.R. 994 is indefensible when subjected to any meaningful cost/benefit analysis. While the Congressional Budget Office has yet to score the costs of H.R. 994, they will be substantial, particularly when reckoned in light of

³ H.R. 994 also conflicts with the directives the House recently gave to agencies in its recent amendments to the Paperwork Reduction Act (PRA). The PRA instructs agencies to cut their paperwork burden every year, while H.R. 994 adds significantly to the agencies' burdens, since agencies will have to gather extensive data in order to perform the analyses called for in section 4.

shrinking agency budgets. And it is equally beyond dispute that the requirements of H.R. 994 in part replicate existing requirements in an Executive Order being vigorously enforced by the President. Under these circumstances, Congress should not proceed with H.R. 994.

Thank you for this opportunity to share our views.

CITIZENS FOR SENSIBLE SAFEGUARDS

Statement of Principles

Public protections, such as those dealing with food safety, safe drinking water, worker health and safety, equal educational opportunity, civil rights, motor vehicle safety, toxic pollution, the well-being of children, and health care, are under attack through Congressional initiatives to reduce or eliminate federal laws and regulations. The following organizations believe the federal government has an important role in protecting the public interest and in improving quality of life. We believe that undermining federal safeguards will cause serious harm to citizens. These Congressional initiatives also jeopardize services provided by public charities and religious and governmental entities valued by our society.

Buried in the *Contract with America's* rhetoric about shrinking government and rolling back red tape is a plan to undo laws and safeguards that citizens have struggled long and hard to champion. We strongly support improving laws and safeguards that protect citizens while recognizing the need to reduce unnecessary red tape. The zeal to minimize regulatory burdens, however, must be balanced with the need to ensure protections for all Americans. Accordingly, we oppose actions taken by Congress to undermine sensible safeguards.

We urge President Clinton and Congress not to let the popular cry of cutting red tape -- something we all believe in -- become a guise for dismantling federal safeguards that should be preserved.

Coalition Structure

Citizens for Sensible Safeguards has three standing committees: National Strategy Committee, chaired by American Federation of State, County, and Municipal Employees, National Education Association, and OMB Watch; Grassroots Strategy Committee, chaired by OMB Watch, Sierra Club Legal Defense Fund, and United Cerebral Palsy Associations; and Media/Message Committee, chaired by American Oceans Campaign and Service Employees International Union.

A Steering Committee oversees coalition activities. The Steering Committee is currently comprised of AFL-CIO, American Civil Liberties Union, American Federation of State, County, and Municipal Employees, American Oceans Campaign, The Arc, Families USA, Leadership Conference on Civil Rights, National Education Association, Natural Resources Defense Council, OMB Watch, Public Citizen, Service Employees International Union, Sierra Club Legal Defense Fund, United Auto Workers, United Cerebral Palsy Associations, United Methodist Church, and US PIRG. OMB Watch chairs the coalition.

Signers (as of 2/22/95)

20/20 Vision
Action on Smoking and Health
Advocates for Youth
AFL-CIO

1742 Connecticut Ave., NW Washington, D.C. 20009
Phone: (202) 234-8494 Fax: (202) 234-8584
E-mail Address: regs@rtk.net

AIDS Action Council
 Alabama Conservancy
 Alliance for Justice
 Alliance to End Childhood Lead Poisoning
 Alice Hamilton Occupational Health Center
 Amalgamated Clothing and Textile Workers Union
 Amalgamated Transit Union
 American Academy of Child and Adolescent Psychiatry
 American Arts Alliance
 American-Arab Anti-Discrimination Committee
 American Association of Children's Residential Centers
 American Association of Classified School Employees
 American Association of People with AIDS
 American Association of University Affiliated Programs for Persons with
 Developmental Disabilities
 American Association of University Professors
 American Association of University Women
 American Association on Mental Retardation
 American Civil Liberties Union
 American Council for the Blind
 American Federation of State, County, and Municipal Employees
 American Foundation for AIDS Research
 American Heart Association
 American Lung Association
 American Network of Community Options and Resources
 American Nurses Association
 American Oceans Campaign
 American Occupation Therapy Association
 American Planning Association
 American Postal Workers Union
 American Psychological Association
 American Public Health Association
 American Speech-Language-Hearing Association
 Americans for Democratic Action, Inc.
 Association of Farmworker Opportunity Programs
 Association of Flight Attendants, AFL-CIO
 Association of Maternal and Child Health Programs
 Association of Schools of Public Health
 Atlantic States Legal Foundation
 Bazelon Center for Mental Health Law
 Bridges To Democracy
 Center for Advancement of Public Policy
 Center for Community Change
 Center for the Development of International Law
 Center for Marine Conservation
 Center for Media Education
 Center for Science in the Public Interest
 Center for Women Policy Studies
 Center on Disability and Health
 Children's Defense Fund
 Child Welfare League of America
 Church Center for Sustainable Community
 Citizen Action
 Citizen Alert

Citizens for Public Action on Blood Pressure and Cholesterol, Inc.
 Clean Water Action
 Clearinghouse on Environmental Advocacy and Research
 Coalition for New Priorities
 Coalition on Human Needs
 Coast Alliance
 Colorado Rivers Alliance
 Common Agenda Coalition
 Communications Workers of America
 Community Nutrition Institute
 Community Women's Education Project
 Consumer Federation of America
 Cornucopia Network of New Jersey
 Council for Exceptional Children
 Defenders of the Wildlife
 Department for Professional Employees, AFL-CIO
 Disability Rights Education and Defense Fund
 Earth Island Institute
 Earth Island Journal
 Ecology Center of Ann Arbor
 Ecology Task Force
 Environmental Action Foundation
 Environmental Defense Fund
 Environmental Research Foundation
 Environmental Working Group
 Epilepsy Foundation of America
 Families USA
 Family Service America
 Food and Allied Service Trades Department, AFL-CIO
 Food Research and Action Center
 Friends Committee on National Legislation
 Friends of the Earth
 Frontlash
 Great Lakes United
 Hamlet Response Coalition
 Harmarville Rehabilitation Center
 Health and Development Policy Project
 Helen Keller National Center
 Humane Society of the United States
 Interfaith Impact
 Inter/National Association of Business, Industry and Rehabilitation
 International Association of Fire Fighters
 International Brotherhood of Teamsters
 International Chemical Worker's Union
 International Federation of Professional and Technical Engineers
 International Ladies' Garment Workers' Union
 International Longshoreman's and Warehouseman's Union
 International Union of Electronic, Electrical, Salaried, Machine, and Furniture Workers
 Izaak Walton League of America
 James C. Penney Foundation
 Justice for All
 Kentucky Waterways Alliance
 Leadership Conference on Civil Rights
 League of Women Voters of the U.S.

Learning Disabilities Association
 Legal Action Center
 Martin Luther King Jr. DC Support Group
 Massachusetts Coalition for Occupational Safety and Health
 Mexican-American Legal Defense and Educational Fund
 Mineral Policy Center
 National Association for the Advancement of Colored People
 National Association of Developmental Disabilities Councils
 National Association of Homes and Services for Children
 National Association of Protection and Advocacy Systems
 National Association of School Psychologists
 National Association of Service and Conservation Corps
 National Association of Socially Responsible Organizations
 National Association of Social Workers
 National Association of the Deaf
 National Association of Vocational Assessment and Education
 National Audubon Society
 National Campaign for Pesticide Policy Reform
 National Center for Learning Disabilities
 National Coalition for the Homeless
 National Coalition on Deaf-Blindness
 National Consumers League
 National Council of Jewish Women
 National Council of La Raza
 National Council of Senior Citizens
 National Council on Family Relations
 National Education Association
 National Family Farm Coalition
 National Head Injury Foundation
 National Health Care for the Homeless Council
 National Low Income Housing Coalition
 National Network of Runaway and Youth Services
 National Parks and Conservation Association
 National Recreation and Park Association
 National Rural Housing Coalition
 National Therapeutic Recreation Society
 National Urban League
 National Women's Law Center
 Natural Resources Defense Council
 Neighbor to Neighbor
 NETWORK: A National Catholic Social Justice Lobby
 Network for Environmental and Economic Responsibility/United Church of Christ
 New Jersey Industrial Union Council
 New York Committee for Occupational Safety and Health
 North Carolina Occupational Safety and Health Project
 Northwest Coalition for Alternatives to Pesticides
 Nuclear Information and Resource Service
 Oil, Chemical & Atomic Workers International Union
 OMB Watch
 Oregon Health Systems in Collaboration
 Ozone Action
 Pacific Rivers Council
 Paralyzed Veterans of America
 People For the American Way Action Fund

Phillaposh
 Physicians for Social Responsibility
 Protestant Health Alliance
 Public Citizen
 Public Employee Department, AFL-CIO
 Public Employees for Environmental Responsibility
 Public Voice for Food and Health Policy
 Rhode Island Committee on Occupational Safety and Health
 River Network
 Rivers Council of Washington
 Safefood Coalition
 Scenic America
 Service Employee's International Union
 Sierra Club
 Sierra Club Legal Defense Fund
 Society For Animal Protective Legislation
 Southern Utah Wilderness Alliance
 Special Vocational Education Services in PA
 Spina Bifida Association of America
 S.T.O.P. - Safe Tables Our Priority
 Telecommunications for the Deaf, Inc.
 The Arc
 The Loka Institute
 The Newspaper Guild
 The Wilderness Society
 Trout Unlimited
 Union of American Hebrew Congregations
 Union of Concerned Scientists
 Unitarian Universalist Association
 Unitarian Universalist Service Committee
 United Auto Workers
 United Brotherhood of Carpenters and Joiners of America, AFL-CIO
 United Cerebral Palsy Associations
 United Church of Christ, Office for Church in Society
 United Food and Commercial Workers International Union
 United Methodist Church, General Board of Church and Society
 United Mineworkers Union
 United Rubber, Cork, Linoleum, and Prospect Workers of America
 United Steelworkers of America
 US PIRG
 Vocational Evaluation and Work Adjustment Association
 Western Massachusetts Coalition for Occupational Safety & Health
 Western New York Council on Occupational Safety and Health
 Wider Opportunities for Women
 Women Employed
 Women of Reform Judaism, The Federation of Temple Sisterhoods
 Women's International League for Peace and Freedom
 Women's Legal Defense Fund
 Women's National Democratic Club
 Women Strike for Peace
 Women Work! The National Network for Women's Employment
 World Institute on Disability

Mr. MCINTOSH. Oh, certainly, my pleasure. And I do appreciate you coming here and sharing those with us. Let me address a couple of the points in your testimony. One that someone pointed out to me—on the 10(b)(5), actually it is controversial enough that some of the recent legislation we passed in court reform had to do with some of the provisions there. But you can always find examples, and I get your point.

There are some things that people clearly think are working well and there's no need for review. Now, presumably those reviewed could be done much more expeditiously and be done with it.

Mr. VLADECK. Well, let me interrupt you, because I don't agree with that. I mean, for example, take 10(b)(5). Under H.R. 994, the SEC would have to do a cost benefit study to justify the continuation of rule 10(b)(5), which would be difficult to do. For one thing, the compliance costs that are required under 10(b)(5) are enormous. But the agency would have to go through the Paperwork Reduction Act, take a survey, assuming that you haven't shrunk their paperwork budget enough to allow them to do this. They'd have to go take a survey to find out what the compliance costs are.

Then they'd have to try to measure the benefits of rule 10(b)(5). Is it in the fines that have accrued to the SEC? Is it in the confidence that the investors have in the market? It's not necessarily an automatic undertaking that the agency will be able to do quickly.

Mr. MCINTOSH. Well, I guess I'm confident that that information, if it's in fact obvious, would be readily available. Now, maybe when it's not obvious, that means that there's a dispute or there aren't, in fact, significant benefits there. But let me move on to another point that you made, which was perhaps what should be done is strengthen the petition process in the APA.

If we use that as a vehicle to say, essentially, this review would be triggered, instead of automatically for all regulations, whenever there was a petition. Does that ameliorate some of the concerns that you've got?

Mr. VLADECK. You would ameliorate some of them. One of the things that I would urge you to consider doing is to create advisory committees made up of people in the regulated community, people who benefit from the regulation, to basically tell agencies what rules ought to be revisited. And if you wanted to make the recommendation to the advisory committee somehow binding on the agency, that is, they had to take those seriously, that may be a better way of targeting with some precision where rules aren't working well.

It may be that some combination of those approaches would be superior to what I think is the blunder bus approach in H.R. 994.

Mr. MCINTOSH. See, one of the things that the reason I think judicial review is important, and one of the reasons a petition process may be a mechanism that's worth looking into, is that I think we shouldn't have the agencies being left to their own devices, if you will, or their own judgment on what needs to be reviewed, or outside panels that I think they could have a great deal of influence over.

I'm searching for a way in which we can empower the regulated community to have more input into the process and an ability to

force the agencies to conduct a cost benefit analysis where it might be necessary. And so for those reasons, I'm very much in favor of a judicial review provision. I'd like to take into consideration the comments from today's hearings on looking at this petition process, and see what could be done there.

But I think we've got to, in some ways, change the dynamic so that the regulated community has a greater voice and an effective mechanism for prompting agency responses to their concern.

Mr. VLADECK. Well, I think that's a very powerful point, and I think it has a great deal of force. I would suggest, however, there are ways of doing it that are less draconian than H.R. 994. For example, Congress can appoint the members of the advisory committee. There's no separation of powers problem with doing that. There are congressional advisory committees.

They could act, in some ways, as your eyes and ears to——

Mr. MCINTOSH. Without denigrating my colleagues, my experience is that Congress isn't always the perfect advocate for the regulated community, either.

Mr. VLADECK. But nor are the courts. I mean, one point I would like to really emphasize is that you're placing your money on the courts. That's a very, very risky bet, particularly given the way judicial review is framed here. If I'm a reviewing judge in one of these cases, I don't know what standard Congress intended me to apply.

It may be that—and I think Sally Katzen made this point—it may be that simply all I'm supposed to do is go through the checklist of the 18 criteria and make sure that there's the right paragraph in the Federal Register document addressing it. Many judges, I think, would take that approach. It may be that other judges would say, no, no, Congress intended more; and we're going to review the quality of the cost benefit analysis and its comprehensiveness.

But if that's your aim, Mr. Chairman, I think you need to do more than in terms of fine-tuning the judicial review provision, because what you have here I do not think provides the check that you are hoping for.

Mr. MCINTOSH. Let me take your point as a valid one, that the courts can't save us from all of this also. Although I think, perhaps, the benefit is that the threat of taking it to the court will cause the agencies to act more reasonably. And likely, you won't have many of these tested in terms of that. But I appreciate that, and thank you, again, for coming and sharing your comments with us.

Let me see if Mr. Peterson has any comment.

Mr. PETERSON. No.

Mr. MCINTOSH. Thank you very much.

Mr. VLADECK. Thank you very much.

Mr. MCINTOSH. The subcommittee will stand adjourned.

[Whereupon, at 1:50 p.m., the hearing was adjourned, subject to the call of the Chair.]

H.R. 994, REGULATORY SUNSET AND REVIEW ACT OF 1995

TUESDAY, MAY 2, 1995

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH,
NATURAL RESOURCES, AND REGULATORY AFFAIRS,
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:10 p.m., in room 2154, Rayburn House Office Building, Hon. Jon D. Fox (vice chairman of the subcommittee) presiding.

Present: Representatives Fox, Gutknecht, Kanjorski, McIntosh, Slaughter, Spratt, and Waxman.

Staff present: Mildred Webber, staff director; Todd Gaziano, chief counsel; Karen Barnes, professional staff member; David White, clerk; and Bruce Gwinn, minority professional staff.

Mr. FOX. There being a quorum present, the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs will come to order. Chairman McIntosh has been unavoidably detained in another governmental meeting. However, he will rejoin the hearing in progress in a short while. At this time, I'd like to make an opening statement and offer the same courtesy to other members of the group.

We meet today for the purpose of eliciting views from members of the executive branch concerning H.R. 994, the Regulatory Sunset and Review Act of 1995. This act would require agencies to review their regulations on a regular basis, and to make recommendations either to terminate, continue in effect, modify, or consolidate those regulations.

In addition, H.R. 994 would automatically terminate existing Federal regulations in 7 years, unless each agency reauthorizes those regulations within its jurisdiction in accordance with the procedures and criteria set forth within the act.

We are very fortunate to have today with us Richard Roberts, Commissioner of the Securities and Exchange Commission; Judy Feder, Principal Deputy Assistant Secretary for Planning and Evaluation at the Department of Health and Human Services; James Gilliland, General Counsel, Department of Agriculture; Edward Knight, General Counsel, Department of the Treasury; Stephen Kaplan, General Counsel, Department of Transportation; and William E. Kennard, General Counsel, Federal Communications Commission.

Thank you all for joining us today at this hearing. I'm glad to turn the mike over to the distinguished Member, Mr. Waxman of California.

Mr. WAXMAN. Thank you very much, Mr. Chairman. And I want to thank you for holding today's hearing in response to the minority's request for witnesses. The hearing will be a valuable opportunity to learn exactly how the sunset legislation, H.R. 994, will affect specific agencies. The testimony we will hear today, and I've had a chance to review some of the written statements, is extremely troubling.

While I support the idea of reviewing old regulations, the legislation we're considering today is grotesquely flawed. It seems deliberately designed to cause the maximum waste of taxpayers' dollars for the minimum public benefit. The testimony from the agencies reveals three fundamental flaws with H.R. 994.

First, the requirement to review all regulations, or even to review all so-called major regulations, is an enormous waste of resources. We should focus our review efforts on regulations that are causing identified problems, not squander our resources by indiscriminately reviewing all regulations. One small agency, the FCC, says it would have to devote 120 employees, one-third of its regulatory work force, to compliance with this legislation, with virtually no public benefit.

Second, we should not override all existing laws by enacting 18 new economic review criteria that supersede these laws. In many cases, the new review criteria make no sense. For instance, it makes no sense to apply cost benefit analysis to tax regulations. No one can identify what the benefits of a tax regulation are, since they depend on how the Federal Government spends the tax dollars.

In other cases, the new review criteria would gut important health and environmental protections. For instance, H.R. 994 would replace the provisions of the Clean Air Act and the Safe Drinking Water Act that give primacy to protecting public health with provisions that give primacy to reducing economic costs. Third, the sunset provisions in H.R. 994 would severely punish the public for mistakes made by regulatory agencies.

This Draconian provision is grossly unfair. For instance, if the Treasury Department fails to review the regulations under the Bank Secrecy Act in a timely manner, these regulations would sunset. And drug dealers, weapons traffickers, and terrorists could launder money without fear of detection. If FDA fails to review its blood supply regulations, which guard the blood supply against AIDS and other infectious diseases, well, these regulations would sunset; and the blood supply would be unprotected.

If the Environmental Protection Agency fails to review its pesticide regulations in a timely manner, thousands of tolerances for pesticides would expire, and farmers would be unable to use pesticides in growing food crops. If the Department of Transportation fails to review its motor vehicle safety regulations on time, car makers would no longer be required to install air bags or other safety features.

H.R. 994 imposes impossible burdens on the Federal agencies. It is inevitable that the agencies are going to miss many of its dead-

lines. Even when agencies have the staff and resources to comply with review schedules, unexpected delays often occur. What this bill says is that when this happens, the public health and many businesses are punished because a regulation automatically terminates, no matter how essential to health, welfare or economic activity the regulation may be.

This is simply absurd policy. I'm pleased we're holding this hearing to get these views on the record so that we can understand what we're doing in this legislation. And if what we're doing is what I've spelled out and what I fear to be the case, then I would hope the bill would not see the light of day. Thank you, Mr. Chairman.

Mr. FOX. Thank you, Congressman Waxman. At this time, I'd like to call on the chairman of the committee, Congressman McIntosh, for his opening statement.

Mr. MCINTOSH. Thank you, Mr. Fox. I appreciate your willingness, as the vice chairman, to chair this hearing. I'm going to be having meetings throughout this period on the leadership meeting, and will be in and out. And I wanted to say thank you to all of the witnesses for coming today and sharing your views with us.

In terms of an opening statement, let me simply say I agree with the statement given by Mr. Fox and would encourage the witnesses to help us today as they see difficulties in the way the legislation is currently drafted.

If they could focus their remarks on possible ways of improving on this general concept in a way that will allow for an orderly transition from 1 year to the next in the regulatory programs of the agencies, and an appropriate tool that I think could, perhaps, if used correctly, be beneficial to the work that you all are doing in your various agencies and commissions.

So I have no further statement, but want to thank you very much for appearing, and look forward to seeing and hearing your testimony. We are interested in working on a rewrite of some of the provisions of the bill, so your testimony, in terms of how it can be improved, will be taken to heart. Thank you.

[The prepared statements of Hon. David McIntosh and Hon. Cardiss Collins follow:]

WILLIAM F. CLINGER, JR., PENNSYLVANIA
CHAIRMAN

CANDISS COLLINS, ILLINOIS
RANKING MINORITY MEMBER

ONE HUNDRED FOURTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT
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Congressman David M. McIntosh
Opening Statement
Hearing on The Regulatory Sunset and Review Act of 1995, H.R. 994
Part II
Tuesday, May 2, 1995

We meet today for the purpose of eliciting views from members of the executive branch concerning H.R. 994, "The Regulatory Sunset and Review Act of 1995." This Act would require agencies to review their regulations on a regular basis and to make recommendations to either "terminate, continue in effect, modify, or consolidate those regulations." In addition, H.R. 994 would automatically terminate existing federal regulations in seven years, unless each agency reauthorizes those regulations within its jurisdiction in accordance with the procedures and criteria set forth within the Act.

The primary goal of this bipartisan piece of legislation is to eliminate those regulations which are conflicting, duplicative, or simply obsolete. In today's fast-paced global economy, we cannot afford to underestimate the need to minimize the costs and burdens associated with government regulation. In order to achieve that end, this Act simply calls for a periodic internal review- something to which ever efficient, well-managed business must subject itself in order to contain costs and remain competitive.

If adopted, H.R. 994 will provide a great deal of regulatory relief to virtually every segment of our economy by requiring regulations to be evaluated in terms of current circumstances in order to assess the need for, and the effectiveness of, a particular regulation. With a streamlined regulatory structure, our economy will become more competitive in the global market and will produce more jobs within our own borders. The Regulatory Sunset and Review Act of 1995 not only promises a higher standard of living for all Americans, but also responds to the public's plea for less government and less regulation.

I would now like to call on Commissioner Richard Roberts of the Securities and Exchange Commission to begin his testimony.

Mr. Roberts.....welcome.

WILLIAM F. CLINGER, JR., PENNSYLVANIA
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HONORABLE CARDISS COLLINS
RANKING MINORITY MEMBER

H.R. 994 REGULATORY SUNSET AND REVIEW ACT

MAY 2, 1995

Mr. Chairman, I want to thank you for your cooperation in scheduling this hearing.

H.R. 994, the Regulatory Sunset and Review Act of 1995, would impose significant new burdens on Federal agencies. I feel certain that the views and comments of agencies, such as those we have before us today, will be of great help to the Subcommittee in its consideration of this legislation.

All of us, Republicans and Democrats, want our laws to be implemented in a way that is sensible, that is not overly burdensome, and that achieves the purpose for which Congress passes them. To accomplish this goal, agencies need guidance and the flexibility to respond to changing circumstances and new information. A periodic review of regulations, therefore, makes sense, and for this reason, the present Administration, as well as each of the preceding three administrations, has undertaken a review of Federal regulations.

These reviews have taught us a great deal, including how important it is for agencies to provide ongoing assistance, so that the regulated community may better understand how to fulfill their obligations. Greater communication also gives agencies feedback so they may better understand compliance problems and may identify any changes in regulations that are needed.

I am concerned that H.R. 994 would distract agencies from working directly with regulated entities to help them comply with their obligations. As presently drafted, the bill would force agencies to devote their resources to costly, staff-consuming reviews of all regulations, even those regulations about which there are no complaints.

By establishing new criteria that an agency could use to change a regulation, this bill may also cause an agency to make regulatory changes that are not consistent with the law Congress originally passed.

To illustrate my concerns, I would like to share with you a few comments on H.R. 994 that I have received from several agencies. The Nuclear Regulatory Commission (NRC) wrote me that the bill would require them to review regulations comprising 1345 pages of the Code of Federal Regulations and that this task would cost them an estimated \$50 million a year.

The NRC says 442 Full Time Equivalent staff would be needed over seven years to accomplish the review required by the bill. These substantial regulatory costs would have to be passed on to agency licensees because of the 100% budget recovery requirement of the Reconciliation Act of 1990.

The Commission also said, and I quote, "absent substantial amendment, the legislation could have the unintended effect of creating regulatory instability, particularly regarding advanced reactor design certifications, and would impose additional costs upon our Agreement States."

A letter I received from the Immigration and Naturalization Service said, and I quote, "The additional staffing required to conduct such reviews is considerable, and the workload would interfere with addressing the needs of servicing the customers of the agency in a timely and efficient manner."

The Federal Deposit Insurance Corporation (FDIC) said it would need between 20 and 25 employees and an additional \$1.9 to \$2.3 million a year to carry out the requirements of H.R. 994. The FDIC also went on to say that its ability to function as an independent agency would be compromised by H.R. 994, and I quote:

"H.R. 994 would significantly change the regulatory process by subjecting the FDIC's rulemaking reviews and decisions to review by the Office of Management and Budget. This could dramatically reduce the independence of the FDIC, thereby compromising the agency's authority to make the tough, unbiased judgments necessary to protect the deposit insurance funds and retain the public's trust. If the FDIC's rulemaking activities were subjected to direct or indirect oversight by other government agencies, it is possible that the deposit insurance funds could be diverted to accomplish goals other than the protection of insured depositors and the safety and soundness of the financial system."

The FDIC also said it is, and I quote, "concerned with the lack of flexibility imposed by the deadlines in section 3(a) of H.R. 994. If unforeseen and uncontrollable circumstances caused an agency to miss a deadline even lightly, the draconian result could be the termination of a regulation essential for the protection of the financial system."

The Commodity Futures Trading Commission (CFTC) said, and I quote, "The regulatory review provisions proposed by H.R. 994 would impose substantial additional paperwork requirements on the Commission. In this respect, these provisions could be duplicative of existing obligations under the Administrative Procedure Act, the Paperwork Reduction act and Regulatory Flexibility Act."

Mr. Chairman, I request that I be permitted to insert the full text of the agency comments I have received into the record of this hearing. Their views, as well as the views of agencies like those we have testifying before us today, must be fully evaluated as the Subcommittee proceeds with the consideration of this legislation.

Mr. FOX. Thank you, Mr. Chairman. I'd ask all the witnesses to please rise, to collectively have the oath.

[Witnesses sworn.]

Mr. FOX. At this time, I'd call upon—first of all, I'll let you know that, for each of the witnesses, that we're observing the 5-minute rule. Try to have your testimony complete within 5 minutes. You, of course, have the opportunity to have all of your written statement included within the record. And we'll try to be as reasonable on the relaxation of that rule as it relates to the middle of paragraphs and sentences.

At this time, we'd like to call on Richard Roberts, the Commissioner of the Securities Exchange Commission. Mr. Roberts.

STATEMENT OF RICHARD ROBERTS, COMMISSIONER, SECURITIES AND EXCHANGE COMMISSION

Mr. ROBERTS. Thank you, Vice Chairman Fox, Chairman McIntosh, Congressman Waxman. I appreciate this opportunity to testify on behalf of the Securities and Exchange Commission, an independent agency, regarding H.R. 994, the Regulatory Sunset and Review Act of 1995. The SEC firmly believes that agencies should continually review their regulations, and has itself endeavored to do so.

Although we share the goals of H.R. 994, we have certain concerns about how the specific regulatory review process it mandates would affect the SEC. The statutes administered by the SEC govern the operations of our Nation's securities markets and the protection of investors in those markets. To a large extent, these statutes require the SEC to adopt rules in order to activate the operative terms of the statutes and effectuate their purposes.

For more than 60 years, this regulatory scheme has served our country well and has made our securities markets the strongest and safest in the world. In order to maintain fair and efficient markets and to best protect investors, the SEC works on an ongoing basis with self-regulatory organizations, industry groups and investors, to review and revise its rules in light of changing conditions and market needs.

We are concerned that H.R. 994, as drafted, may in some ways inhibit rather than enhance our efforts to ensure that our regulations continue to serve the purposes of the Federal securities laws. The legislation does not adequately distinguish between those rules that are critical to the functioning of our markets that may need careful and constant monitoring or that deal with areas in which specific problems have arisen, and those that are not and do not.

If, because of the additional attention required to be given generally to all rules under H.R. 994, less attention is given to these key regulations or to the immediate problems that affect the securities markets, it could have an adverse impact on both the securities industry and investors. H.R. 994 also does not distinguish between rules that are restrictive in nature and those that are exemptive.

The latter allow activities that would otherwise be prohibited by statute. Review of the former may deserve greater and more immediate attention than review of the exemptive rules. We are also concerned that an automatic termination of a rule, due to an inad-

vertent failure to meet the requirements of H.R. 994, could have unintended and potentially serious consequences.

The SEC is committed to reviewing and rethinking its rules, but we believe that a better approach would be to develop a system that encourages agencies to focus on rules that are important, either because of their overall cost or problems that may arise, and that gives agencies the time and tools to do real regulatory reviews. Perhaps each agency, in its oversight committee, could work together to craft a program for the review of the agency's regulations that is tailored to the individual needs of the agency.

Now, the Commission of the SEC has submitted longer testimony for the record, of course. And at the appropriate time, I would be happy to attempt to respond to any questions.

[The prepared statement of Mr. Roberts follows:]



TESTIMONY OF

**RICHARD Y. ROBERTS, COMMISSIONER
U.S. SECURITIES AND EXCHANGE COMMISSION**

**REGARDING H.R. 994,
THE REGULATORY SUNSET AND REVIEW ACT OF 1995**

**BEFORE THE
SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH,
NATURAL RESOURCES AND REGULATORY AFFAIRS
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT**

UNITED STATES HOUSE OF REPRESENTATIVES

MAY 2, 1995

U. S. Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

TESTIMONY OF

RICHARD Y. ROBERTS, COMMISSIONER
U.S. SECURITIES AND EXCHANGE COMMISSION

REGARDING H.R. 994,
THE REGULATORY SUNSET AND REVIEW ACT OF 1995

BEFORE THE SUBCOMMITTEE ON NATIONAL ECONOMIC
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HOUSE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

MAY 2, 1995

I appreciate this opportunity to testify on behalf of the Securities and Exchange Commission regarding H.R. 994, the Regulatory Sunset and Review Act of 1995. The SEC firmly believes that agencies should continually review their regulations and has itself endeavored to do so. Although we share the goals of H.R. 994, we have certain concerns about how the specific regulatory review process it mandates would affect the SEC.

The statutes administered by the SEC govern the operation of our nation's securities markets and the protection of investors in those markets. To a large extent, these statutes require the SEC to adopt rules in order to activate the operative terms of the statutes and effectuate their purposes. For more than sixty years, this regulatory scheme has served our country well and has made our markets the strongest and safest in the world. In order to maintain fair and efficient markets, and to best protect investors, the SEC works on an ongoing basis with self regulatory organizations,

industry groups, and investors to review and revise its rules in light of changing conditions and market needs.

We are concerned that H.R. 994, as drafted, may in some ways inhibit rather than enhance our efforts to ensure that our regulations continue to serve the purposes of the federal securities laws. H.R. 994 does not adequately distinguish between those rules that are critical to the functioning of our markets, that may need careful and constant monitoring, or that deal with areas in which specific problems have arisen, and those that are not or do not. If, because of the additional attention required to be given generally to all rules under H.R. 994, less attention is given to these key regulations or to the immediate problems that affect the securities markets, it could have an adverse effect on both the securities industry and investors. H.R. 994 also does not distinguish between rules that are restrictive in nature and those that are exemptive, that allow activities that would otherwise be prohibited by statute. Review of the former may deserve greater and more immediate attention than review of the latter. We are also concerned that an automatic termination of a rule due to an inadvertent failure to meet the requirements of H.R. 994 could have unintended and potentially serious consequences.

THE SEC AND ITS RULES

The SEC is the independent agency charged by Congress with protecting investors in the U.S. securities markets. The regulatory scheme created by Congress

more than five decades ago has worked extraordinarily well, both in protecting investors and in contributing to the growth of the U.S. securities markets. In 1990, the New York Stock Exchange estimated that over 51 million individual Americans owned common stock or shares of a common stock mutual fund. More recently, the Investment Company Institute has estimated that one out of every three American households owns shares of a mutual fund. Americans increasingly rely on the stock market and mutual funds to fund their retirements or other long-range plans.

There are four major federal securities laws:

- The Securities Act of 1933 requires persons making a public offering of securities to register the offering and provide appropriate disclosures.
- The Securities Exchange Act of 1934 requires public companies to file annual and periodic reports, and prohibits fraud and manipulation. The Exchange Act also establishes the system by which stock exchanges and brokerage firms are regulated by the Commission.
- The Investment Company Act of 1940 provides a comprehensive regulatory regime for mutual funds and other investment companies.
- The Investment Advisers Act of 1940 regulates investment advisers, both those advising investment companies and those advising individual investors.

The SEC also administers several other statutes, including the Public Utility Holding Company Act of 1935 and the Trust Indenture Act of 1939. Together, these

six acts run to over 400 pages.¹ Many provisions of these laws contemplate or require that the SEC issue implementing rules. For example, Congress did not specify in the Exchange Act the information that companies must include in the annual, quarterly and other reports they file with the SEC. Congress simply required that companies file such reports "in accordance with such rules and regulations as the [SEC] may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security."²

The SEC, as Congress expected and the statutes required, has used its authority under the federal securities laws to develop a focused and flexible set of rules to regulate the public offering of securities and the operations of the securities markets, and to deter fraudulent practices. Many of these rules, of course, address issues such as the organization of the SEC and its procedures.³ Other rules allow activity that would otherwise be prohibited or questionable under the statute. Under the Investment Company Act, for example, many broadly defined types of transactions are prohibited unless the SEC provides an exemption.⁴ Other SEC rules create "safe

1. See Staff of House Comm. on Commerce, 104th Cong., 1st Sess., *Compilation of Securities Laws Within the Jurisdiction of the Committee on Commerce* (Comm. Print 1995).

2. See 15 U.S.C. § 78m(a) (1988).

3. See 17 C.F.R. pt. 200-203 (1994).

4. See, e.g., 17 C.F.R. §§ 270.17a-7 (sales of securities among affiliated investment companies), 270.6c-10 (deduction of sales load from proceeds of redemption of shares of an open-end investment company), 270.17f-5 (permitting custody of securities in certain foreign banks).

harbors" from requirements of the Securities Act⁵ or Exchange Act.⁶ Still other rules simplify requirements that would otherwise apply, such as the set of rules that simplifies the disclosure requirements for small businesses.⁷

The SEC places a high priority on reviewing and rewriting its existing rules to conform to current conditions, to reduce burdens and to increase flexibility. In recent years, the SEC's reviews of its rules have led to some major changes:

- The SEC created a new, simpler disclosure regime for small businesses. Since the new small business forms replaced the old S-18 form, the amount of securities registered using these forms has increased from about \$800 million, in the year prior to the change, to more than \$6.3 billion in 1994.⁸
- The SEC substantially narrowed the scope of its proxy rules, making it easier for corporate management and shareholders to communicate with one another about corporate issues. The new proxy rules have enabled shareholders to exercise more active control of corporate management,

5. See, e.g., 17 C.F.R. §§ 230.144, 230.144A, 230.501-08 (1994).

6. See 17 C.F.R. §§ 240.12g3-2, 240.15a-6 (1994).

7. See 17 C.F.R. pt. 228 (1994).

8. See Securities Act Release No. 6949, 57 Fed. Reg. 36442 (Aug. 13, 1992); Securities Act Release No. 6996, 58 Fed. Reg. 26509 (May 4, 1993).

whether through discussions of corporate performance or removal of underperforming managers.⁹

- The SEC's Division of Market Regulation recently reviewed the U.S. equity markets and the regulatory framework for these markets. The SEC has adopted or proposed several new or revised rules as a result of this study.¹⁰
- The SEC's Division of Investment Management recently reviewed the scope and operation of the Investment Company Act. The SEC then adopted a substantial number of rule changes, many of which reduce the scope of the Act or simplify procedures under the Act.¹¹
- The SEC has just completed a comprehensive revision of its Rules of Practice. The revised Rules, the result of several years of work, should

9. See Exchange Act Release No. 31326, 57 Fed. Reg. 48276 (Oct. 22, 1992); Leslie Wayne, New Proxy Rules Embolden Shareholders, N.Y. Times, May 31, 1993, at 37; David A. Vise, Turning the Proxy Into a Power Tool; Investors Use Clout Gained in SEC Rules, Wash. Post, Mar. 10, 1993, at F1.

10. See Division of Market Regulation, SEC, Market 2000: An Examination of Current Equity Market Developments (1994); Exchange Act Release No. 34753, 59 Fed. Reg. 50866 (Oct. 6, 1994); Exchange Act Release No. 35124, 59 Fed. Reg. 66702 (Dec. 28, 1994).

11. For example, to simplify the securitization of loans and other assets, a form of finance that did not exist when the Act was passed in 1940, the SEC developed a broad exemption for asset securitizations. See Division of Investment Management, SEC, Protecting Investors: A Half Century of Investment Company Regulation (1992); Investment Company Act Release No. 19105, 57 Fed. Reg. 56248 (Nov. 27, 1992); Investment Company Act Release No. 19719, 58 Fed. Reg. 49919 (Sept. 24, 1993); Investment Company Act Release No. 19399, 58 Fed. Reg. 19330 (Apr. 14, 1993); Investment Company Act Release No. 19362, 58 Fed. Reg. 16799 (Mar. 31, 1993).

substantially improve both the fairness and efficiency of the SEC's administrative proceedings.

The SEC continues to review and reconsider its regulations. For example, the SEC is working now on a thorough review of the Public Utility Holding Company Act of 1935 ("PUHCA"). In addition to considering how it could revise its rules to reduce the limits and burdens they impose on registered holding companies, the SEC is also considering whether to recommend again that Congress repeal all or part of PUHCA.¹²

Although the SEC is committed to reassessing all of our rules on an ongoing basis, we generally find that the most productive reviews are those that we initiate in response to comments or complaints we receive from investors or from the securities industry. It is more effective for the SEC to focus regulatory resources on issues that are causing problems rather than on rules that, judging by the absence of complaints, are not. At the present time, for example, and partially in response to concerns expressed by market participants regarding the proliferation of new financial instruments, the dramatic increase in multi-national offerings, and other significant changes in the securities markets in recent years, the SEC is examining comprehensively its antimanipulation rules governing securities offerings.¹³

12. See Holding Company Act Release No. 26153, 59 Fed. Reg. 55573 (Nov. 8, 1994).

13. Securities Exchange Act Release No. 33924, 59 Fed. Reg. 2168 (April 19, 1994).

In addition to this type of "voluntary" regulatory review, the SEC also performs "mandatory" regulatory reviews. The Regulatory Flexibility Act requires agencies to review periodically rules with a significant effect on a substantial number of small entities. The agency is required to consider, among other factors, the "continued need for the rule," the "complexity of the rule," and the "extent to which the rule overlaps, duplicates or conflicts" with other rules.¹⁴ Since 1980, when the Act was passed, the SEC has conducted over 400 such reviews, including reviews of all its major disclosure and market rules.¹⁵

The Paperwork Reduction Act requires agencies and the Office of Management and Budget ("OMB") to review every three years all forms or other means of collecting information. OMB is required to consider "whether the collection of information by an agency is necessary for the proper performance of the functions of the agency."¹⁶ Each year, the SEC and OMB review about 150 SEC requirements under this standard.

In general, the SEC has found "voluntary" reviews far more useful than these "statutory" reviews. To review and rewrite a rule can take months or years of work. To do the job correctly, the SEC must speak with those affected by the rule,

14. 5 U.S.C. § 610 (1988).

15. See Securities Act Release No. 7112, 59 Fed. Reg. 61843 (Dec. 2, 1994); Securities Act Release No. 7039, 58 Fed. Reg. 68578 (Dec. 28, 1993).

16. 44 U.S.C. § 3504(c) (1988).

understand how the rule works in practice, develop and consider alternatives, attempt to predict effects and side effects, draft a proposed revision and explanation, reconsider all this in light of the comment letters, and then prepare a final revised rule. Due to its limited resources and the large number of rules involved, the SEC will not have the time for this type of careful review under a statutory schedule that requires it to review dozens of rules each year. We believe that the public interest will be better served if the SEC continues to focus its attention on the rules that are important, questionable or problematic, rather than on the rules that are simply "next in line" for review.

SUMMARY OF H.R. 994

H.R. 994 would require the head of an agency to review, within seven years of passage of the bill, each agency rule in effect at the time of passage. The agency would also be required to review, within three years of adoption, every new rule made effective after passage of H.R. 994. After a rule is reviewed, the agency would be required to review it again within seven years.

In reviewing each rule, the agency would have to consider eighteen factors. Among these factors are whether "the benefits to society from the regulation exceed the costs to society from the regulation," whether "the most cost-efficient alternative was chosen in the regulation to achieve the objective of the regulation," and whether "the regulation imposes on the private sector the minimum economic burdens

necessary to achieve the purposes of the regulation." Other factors require consideration of overlap with other regulations, clarity of language, and reduction of litigation. The bill does not provide guidance as to the relative weight to be given to the various factors.

For each such review, H.R. 994 would require the agency to prepare and publish three documents. First, under Section 4(c), the agency would have to solicit comments from the public on the rule.¹⁷ Second, under Section 5(a)(1), the agency would have to publish a preliminary report with "specific findings" regarding the eighteen factors and "proposed recommendations" on whether the rule should be extended without change, changed or repealed. Third, under Section 5(a)(2), the agency would have to publish a final report with a "full justification" of the agency's decision regarding the rule and the "factual basis for all determinations" regarding the eighteen factors.¹⁸

Failure to review a rule as required by H.R. 994 -- including failure to follow the procedural steps required -- would result in termination of the rule on the statutory termination date.

17. Under Section 3(d), however, the usual requirements of the Administrative Procedure Act for rulemaking would not apply to reviews under H.R. 994.

18. The preliminary report must be published at least 120 days before the termination date; the final report must be published at least 60 days later, but also at least 60 days prior to the termination date. This schedule would not appear to allow time for the required review of comments on the preliminary report.

H.R. 994 provides that an action for judicial review of agency action cannot be brought more than thirty days after the agency's final report regarding the rule. Since H.R. 994 does not preclude judicial review, but simply limits the time within which an action must be filed, affected parties could challenge agency actions under H.R. 994 in court.¹⁹ Courts would presumably consider such challenges under the usual "arbitrary or capricious" standard.²⁰

COMMENTS ON H.R. 994

Our principal concern with H.R. 994 is that it would create a substantial amount of additional work for the agency without necessarily achieving a careful and focused review of the rules most in need of our consideration. This is because the proposed statute does not distinguish between those rules that have a material impact on investors and the securities markets and that may be in need of adjustment, and other less critical rules; and because it imposes strict deadlines which, if missed, may lead to serious, albeit unintended, consequences.

19. See Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967) ("[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress").

20. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 866 (1984).

The SEC has, at present, more than 1400 rules.²¹ To review these rules at an even pace over seven years, the SEC would have to review over 200 rules a year. In recent years, the SEC has issued about 50 releases regarding final rules each year. Although many of these releases reduce rather than increase regulatory burdens, H.R. 994 would require that all new rules be reviewed within three years. Thus, roughly, H.R. 994 would require the SEC to complete 250 regulatory reviews each year. It would be difficult if not impossible for the SEC, given its limited resources and other priorities, to do a thorough reconsideration and revision of 250 rules each year.²² Given the limited number of people involved in reviewing and writing rules at the SEC, this drain on the SEC's resources could seriously undermine the SEC's ability to do thorough reviews of other rules, or to issue new rules to address new problems or new statutory requirements.

A shift of focus by the SEC away from the examination of specific rules and specific problem areas to the more general ongoing review of rules required by H.R. 994 could have significant adverse consequences for the securities industry and

21. This estimate is based on the number of SEC rules printed in the 1994 Code of Federal Regulations, and may underestimate the number of SEC "rules" under the broad definition in Section 10(5) of H.R. 994.

22. The SEC is a relatively small agency, with only about 2800 employees. The vast majority of these employees have nothing to do with writing or rewriting securities rules: they are involved in inspection, enforcement, market oversight or support services. Many of the people who have some involvement in writing or rewriting securities rules -- the commissioners and senior staffers -- have many other responsibilities. Fewer than forty people at the SEC devote the major portion of their time to rules. Their activities include reviewing existing rules, analyzing the need for new rules, soliciting public comment, research, and drafting.

securities investors. Moreover, the industry and investors would be directly and adversely affected by the operation of H.R. 994 if the SEC for any reason was unable to comply with the conditions for extending certain rules that are necessary for the continued operation of the securities markets. For example, if the SEC failed to extend one of the exemptive rules under the Investment Company Act, whole categories of companies -- finance companies, foreign insurance companies or foreign banks -- might suddenly find themselves subject to the strictures of the Act and unable to carry on their businesses until a new exemptive rule could be adopted.

We also note that the regulatory scheme established by the federal securities laws may be quite different from that of many agencies. In order for our system of securities regulation to operate, the securities statutes require a comprehensive system of carefully focused rules. While ongoing review of these rules is certainly necessary and desirable, we believe it would be preferable for our agency to follow a program of review that is carefully tailored to our specific needs, rather than the more general approach contained in H.R. 994.

There are also several other, more minor problems in H.R. 994:

- Under Section 3, a regulation terminates "unless" the head of the agency meets four conditions.²³ The first condition is that the head of the

23. H.R. 994 authorizes the "head of an agency" to make decisions about terminating, modifying or extending a rule. It is unclear whether the term "head of an agency," in the case of an agency such as the SEC which is headed by a collegial body, is intended to refer to the collegial body or to the individual who acts as chair of the body. The SEC is a collegial commission, where decisions regarding rules are made jointly by the Chairman and the four Commissioners. If the bill is intended

agency "reviews the regulation in accordance with section 4." Does this mean that a regulation terminates if a court later determines that the head of the agency failed adequately to consider one of the eighteen factors listed in Section 4? The second condition is that a preliminary report regarding the review be transmitted to Congress and published in the Federal Register at least 120 days before the termination date. Does this mean that a regulation terminates if, through no fault of the agency, the Federal Register Office fails to publish a preliminary report by this preliminary deadline?

- Section 4 lists eighteen factors to consider, but does not address how these factors are to be integrated with the statutory criteria that authorized or required the rule. If the SEC concludes that the benefits of a rule do not justify its costs, but that the rule is required by one of the securities laws, would H.R. 994 authorize the SEC to repeal the rule? Or does H.R. 994 only authorize review of rules within the constraints already established by statute? These ambiguities will likely lead to litigation, even though minimizing such litigation is one of the avowed goals of the legislation.

to give substantial regulatory power to the Chairman alone, as the "head of the agency," it would substantially change the character of the SEC.

- Section 3 provides that, if an agency fails to comply with all the requirements for extending a regulation by the termination date, "the regulation shall have no force or effect after that termination date." This would appear to require the dismissal of enforcement actions based on the regulation initiated before the termination date. A "saving clause" is necessary so that actions based on a terminated regulation, instituted before the termination date, may continue.

CONCLUSION

The SEC is committed to reviewing and rethinking its rules, but H.R. 994 may actually detract from its ability to do this. The review process of H.R. 994 is akin to reading the dictionary through from A to Z rather than looking up words that pose problems. If Congress wishes to strengthen regulatory review requirements, we believe that a better approach would be to develop a system that encourages agencies to focus on rules that are important, either because of their overall cost or problems that have arisen, and that gives agencies the time and tools to do real regulatory reviews. Perhaps each agency and its oversight committee can work together to craft a program for the review of the agency's regulations that is tailored to the individual needs of the agency.

Mr. FOX. Thank you very much, Mr. Roberts. And now the testimony of Judy Feder, Principal Deputy Assistant Secretary for Planning and Evaluation, Department of Health and Human Services. Thank you very much.

STATEMENT OF JUDY FEDER, PRINCIPAL DEPUTY ASSISTANT FOR PLANNING AND EVALUATION, DEPARTMENT OF HEALTH AND HUMAN SERVICES

Ms. FEDER. Thank you, Mr. Chairman. Mr. Chairman, members of the committee, it is a pleasure to be here to represent the Department of Health and Human Services this afternoon, and with your permission I will summarize the highlights of my testimony.

H.R. 994 purports to provide an orderly, uniform, predictable, and comprehensive process for reviewing existing regulatory burden. However, in practice, we feel it would produce a chaotic, unpredictable, and uneven process. If legislation is to be enacted, we urge that it focus on the goals to be achieved and provide flexibility in attaining them.

I'd like to make four points. The first is that we in HHS already engage in an extensive ongoing review of existing regulations. The great majority of our rules in both health and safety and program management are regularly subjected to review. The Congress has been so active in revising statutes in the last decade that we have routinely updated most of our regulations. Our affected constituencies frequently point out areas needing change during these revisions.

Second, H.R. 994 is too complex and costly. The bill, as drafted, would impose cumbersome, complex, and unnecessary steps in reviewing every existing regulation, no matter how innocuous, to document that the regulation is cost-effective, to obtain public comments, and to obtain congressional review.

In many cases, answering the 18 specific criteria in enough detail to convince the public, the Congress, and the courts that the regulation is benign would require an analysis far longer than the regulation itself. Because the bill would open these regulatory reviews to judicial review, we would have little choice but to handle them with scrupulous procedural care, in order to avoid litigation.

What showing could we make to prove convincingly that a regulation is worded "as simply and clearly as possible," as the bill specifies? And what if simplicity and clarity conflicted, as they often do? Failure to meet either stringent deadlines or legal challenges in the courts would lead to the automatic termination of regulations, without regard to whether they involve any burden of any kind, or are opposed by anyone at all.

We, our constituencies, and the Congress itself would be deluged by regulatory documents. At present, HHS reviews and issues something like 200 significant regulatory packages a year, averaging, perhaps, 100 pages of typed text. That is, on the order of 20,000 pages of regulatory documents are written, reviewed internally, published, and reviewed by the public.

It is likely that the effect of H.R. 994 would be to double this workload, focusing primarily on regulatory provisions that no one is seriously proposing to change, and laden with technical answers

to 18 questions about regulatory burden, plus response to public comments on those answers.

Third, and perhaps even more important than cost and burden, is that H.R. 994 poses a risk to the fundamental goals of the regulatory process. If the department were to miss any deadlines, regulations protecting the public health, or necessary to operate our programs and for grantees to obtain funds appropriated by Congress, would be eliminated without recourse.

For example, we could lose our ability to act against unsafe conditions in nursing homes or in facilities manufacturing food or drugs if the detailed regulatory provisions defining unsafe conditions were rendered void.

Fourth, and finally, we believe that there are better ways to achieve the objectives that are motivating this statute. We could, for example, enlist public input or expert judgment as to which regulations create significant problems. Or, as the bill suggests, in section 5, we could focus review on major regulations, with the burden on the economy of 100 million or more, but unlike the bill, limit the mandated process to such regulations rather than making them simply the first priority for review.

Or the Congress could give us reform candidates and hold us accountable for specific regulatory reviews through committee suggestions and by giving us more flexibility to make changes when statutes are revised. Review could also be done, as President Clinton has ordered, by asking each agency to exercise its own judgment in deciding which regulations warrant reform and then subjecting those recommendations to further executive branch and, ultimately, public and congressional scrutiny.

Whatever method is chosen, we urge that it not involve a lock-step, paper-laden process that does not focus on real reform opportunities. Thank you, Mr. Chairman.

[The prepared statement of Ms. Feder follows:]

TESTIMONY BY

JUDITH FEDER
PRINCIPAL DEPUTY ASSISTANT SECRETARY
FOR PLANNING AND EVALUATION
DEPARTMENT OF HEALTH AND HUMAN SERVICES

BEFORE THE

SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH,
NATURAL RESOURCES, AND REGULATORY AFFAIRS
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT
U.S. HOUSE OF REPRESENTATIVES

May 2, 1995

Good afternoon, Mr. Chairman and Members of this Subcommittee. I am pleased to have the opportunity to discuss H.R. 994, the "Regulatory Sunset and Review Act of 1995", and the efforts of the Department of Health and Human Services to review existing regulations.

I am particularly pleased that you have chosen to focus this hearing on existing regulations. The regulatory reform bills under consideration by the Congress focus almost exclusively on procedures for reviewing future rulemakings. Yet, on a government-wide basis, only a small fraction of new rulemakings each year address existing regulatory burden. Real regulatory reform requires a look at the "base" of existing regulations. We strongly agree with this objective of H.R. 994. We commend its attempt to ensure that no regulatory burdens continue without careful evaluation and an affirmative decision to continue them.

However, we do not believe that the prescriptive "command and control" approach taken in this bill will help us achieve the

underlying objective. Indeed, it may even impede real regulatory reform, and will certainly be very costly.

I am also concerned that the procedural requirements of the bill, while intended to assure a thorough Executive Branch review of every regulation and an opportunity for the Congress to review this work, would create a situation in which important regulatory protections will sooner or later be nullified by accident, by mistake, or by unforeseen legal complications. I do not think that perfection in regulatory review should be sought by jeopardizing food or drug safety or the health of Medicare and Medicaid clients. Paraphrasing the words of the bill itself, these regulatory procedures do not "impose ... the minimum economic burdens necessary to achieve the purposes" of the bill, are not "crafted to minimize needless litigation," and do not use "the most cost-efficient alternative" to achieve their objectives.

H.R. 994 attempts to provide an orderly, uniform, predictable, and comprehensive process for reviewing existing regulatory burden. In practice, it would produce a chaotic, unpredictable, and uneven process. If legislation is to be enacted, we urge that it focus on the goals to be achieved and provide flexibility in attaining them.

To put our specific comments about H.R. 994 in perspective, I would like to share with you the experience of HHS in dealing with both new and existing regulations as a backdrop for commenting on the specific approach of H.R. 994. Our Department is one of the larger regulatory agencies as measured by volume of regulations (though not by the cost of regulations), and encompasses a broad range of regulations covering many sectors of the American economy.

At HHS, there are essentially two kinds of regulations. First,

we have a significant regulatory presence, primarily but not exclusively in the Food and Drug Administration, protecting the health and safety of the American public. In past decades, many of these regulations tended to be stable, although this has changed significantly in recent years with the increasing attention paid to regulatory reform under three administrations and major Congressional enactments including mammography, medical devices, and nutrition labeling.

Second, we have a much greater number of regulations dealing with the terms and conditions of obtaining financial assistance. These regulations cover programs ranging from Medicare and Medicaid to the National Institutes of Health and a wide range of social welfare and health programs in the Public Health Service, the Administration for Children and Families, and the Aging Administration. Some of these programs are administered directly by the Federal government; most through states or directly to private entities. These regulations are designed to make our programs work well. They do this in two ways:

- o Enablement--telling our grantees what we will cover, how to apply, how we will review applications, and what conditions will govern them.

- o Stewardship of Federal funds--making sure that the money is spent properly and prudently for the purposes intended by Congress.

Each individual regulation, of course, reflects circumstances and constraints that are unique to the particular program involved. Invariably, these specific constraints reflect provisions set out in legislation. These have become far more detailed and prescriptive in most statutes in recent years than they were several decades ago.

What is perhaps most striking about both categories of regulations is how much they change over time. This is most clearly evident in the financial assistance regulations. Most of the grant-in-aid programs are reauthorized every three or four years. Each reauthorization bill typically contains dozens of changes, large and small. As a result, we are engaged each year in several hundred rulemakings aimed primarily at updating our regulations to reflect new Congressional decisions. Most of these rulemakings invite comments on both the base regulation and on the provisions proposed for change.

In still other programs, such as Medicare, Medicaid, and Child Support Enforcement, the Congress enacts almost every year statutory changes aimed at generating budgetary savings, program reforms, or both. As a direct result, we must engage in a nearly continuous review of HHS regulations for the great majority of our programs.

For example, from a program area that is not particularly contentious: since 1983 we have issued over a dozen final rules related to the End Stage Renal Disease Program. These rules have affected payment rates, safety practices, and virtually every aspect of this program. As a practical matter, therefore, almost the entire set of rules relating to this program have been scrutinized by both the Department and the public.

The statutes are generally much more stable for health and safety regulations. However, there have been major legislative changes in recent years, including new statutes in areas such as mammography, food labeling, and clinical laboratory regulation. Moreover, in the last ten years an extraordinary number of these regulations have been reviewed and modified as a result of reform initiatives since 1980. Consider, for example, the perennially controversial area of approving new drugs. There have been five revisions of regulations related to drug approval in the last ten

years. These revisions, along with internal reforms in FDA operations, have ushered in truly major reforms, with a key focus on expediting the approval of drugs likely to result in important therapeutic gains related to cancer, AIDS, heart disease, and other major diseases.

I believe that this portrait conveys three key points.

First and foremost, our Department does not regulate in a vacuum. Virtually all of our regulations are driven by statute. With rare exceptions, fundamental regulatory change requires statutory change.

Second, the great majority of our rules already have been subjected to review. The Congress has been so active in revising statutes over the last decade that we have routinely updated most of our regulations. Our affected constituencies frequently point out areas needing change during these revisions.

Third, we have been looking hard for reform opportunities over many years and have revised dozens of existing rules to embody such reforms. Our own staff, the Office of Management and Budget, and our regulated entities and customers have all participated in these reviews. Under President Clinton's direction, we are actually examining the entire body of regulations on a page-by-page basis, looking for obsolete, inefficient, and overly intrusive rules.

I will not claim that the reviews under previous Administrations were uniformly effective or that the opportunities for reform are exhausted. I will claim that there are no bountiful opportunities for discovering major reform opportunities simply by thoroughly reviewing existing regulations.

I would add that we have a regulatory management and review

system in the Department--both at the Secretarial level and in each agency that issues a significant number of rules--that pays serious attention to the burden of existing rules and proposed changes to them. The Chief of Staff, the Executive Secretary and her staff, and an extensive review network throughout the Department provide multiple opportunities to review each regulation. For example, in my own office a specialized staff reviews virtually every regulation of the Department for effects on small business, on states, on families, and on every potential form of regulatory burden. When problems are found, they are brought to me or to the Assistant Secretary, and through us to the highest levels of the Department. The Deputy Secretary personally reviews every major regulation on behalf of the Secretary. I can attest that these reviews are not pro forma. Obviously, under the recent directions from the President, we have redoubled these efforts.

Nor do we rely solely on regulatory proceedings. We solicit the views of our customers and clients, of states, and of professional associations on our regulations, in a wide variety of forums and on repeated occasions. For example, in most of our major program areas, such as child support enforcement, welfare, and public health, there are well established professional associations with whom we participate in meetings and conferences addressed to issues of mutual concern, including administrative, budgetary, legislative, and regulatory issues. Some of these channels are narrowly subject specific, such as two committees of physicians and other health professionals that advise us on clinical laboratory and mammography regulations, respectively. Others are much broader. For example, the Health Care Financing Administration meets regularly with key representatives of the States and has an advisory panel of physicians who regularly meet and make recommendations to HCFA for program reforms. Some of the regulatory topics these groups address involve areas with well-known, continuing problems, such as physician referral

regulations regarding financial interests. Others involve minor irritants that are easy to fix.

Let me illustrate with an example of how we use external advisors to help find and correct regulatory problems. Some years ago the Department decided to make sure that physicians understood their obligations to avoid fraud and abuse by requiring them to sign annual "physician acknowledgments." These acknowledgments were collected by the hospitals at which the physicians had admitting privileges. The basic idea was simple: hospitals would collect these signatures annually from each physician. The Departmental staff who devised and reviewed this requirement foresaw no problem, and the hospitals and doctors who commented foresaw no problem. Unfortunately, in the real world this provision turned out to be a logistical nightmare. Keeping track of which physicians had signed, and when, required designing and maintaining a computer data base. Getting busy physicians who only visit the hospital as needed to handle specific patient problems to pay enough attention to sign a seemingly useless piece of paper required administrative staffs to chase after them. Signatures that were just a few weeks late, perhaps because a physician had been on vacation, raised questions about bills incurred during the unattested time interval. When these issues were raised to us by doctors and hospitals, we determined that annual signatures were not necessary to enforce the anti-fraud laws, and that we could rely on a one-time acknowledgment. We issued a revised regulation to make this fix last year. The point of this story is that we listen and learn. Very few of our regulations create this kind of problem in the first place. However, we are not perfect, the public comment process is not perfect, and sometimes an unforeseen problem emerges. The best way we know to find those few mistakes is to ask our customers and clients what is bothering them.

It is against this backdrop that I raise our concerns over this

bill. H.R. 994, as drafted, would impose cumbersome, complex, and unnecessary steps in reviewing every existing regulation, no matter how innocuous, to document that the regulation is cost-effective, to obtain public comments, and to obtain Congressional review. In many cases, answering the 18 specific criteria in enough detail to convince the public, the Congress, and the courts that the regulation is benign would require an analysis far longer than the regulation itself. Because the bill would open these regulatory reviews to judicial review, we would have little choice but to handle them with scrupulous procedural care in order to avoid litigation.

Failure to meet stringent deadlines would lead to the automatic termination of regulations without regard to whether they involve any burden of any kind, or are opposed by anyone at all. Of obvious concern, in this context, is that the sheer workload involved would take away from our ability to give substantial considered attention to genuine regulatory reform opportunities.

There are a number of interrelated problems. First, we, our constituencies, and the Congress itself would be deluged by regulatory documents. At present, HHS reviews and issues something like 200 significant regulatory packages a year, averaging perhaps 100 pages of typed text. That is, on the order of 20,000 pages of regulatory documents are written, reviewed internally, published, and reviewed by the public. As discussed in the attachment, it is likely that the effect of H.R. 994 would be to double this workload, focusing primarily on regulatory provisions that no one is seriously proposing to change and laden with technical answers to eighteen questions about regulatory burden, plus responses to public comments on those answers. This would mean an extra 20,000 pages, a crippling increase as we are downsizing Executive branch staff and, for the Congress itself, an almost inconceivable review burden in relation to existing legislative workload. I submit that the sheer volume of paper

would all but defeat serious efforts at review. Likewise, it would take significant HHS staff resources, costing perhaps \$10 million a year or more, to conduct such reviews.

Second, if the Department were to miss any deadlines, regulations protecting the public health or necessary for our grantees to obtain funds appropriated by the Congress would be eliminated without recourse. For example, we could lose our ability to act against unsafe conditions in nursing homes or in facilities manufacturing food or drugs if the detailed regulatory provisions defining unsafe conditions were rendered void. We would be vulnerable to litigation on a massive scale for innumerable procedural difficulties or alleged errors of analysis. Preventing these potential problems is not just a matter of doing our business efficiently. There might well be arguments raised, for example, about whether the report to the Congress was properly submitted within the required 60-day time period if the Congress were not in session or took an extended recess. What showing could we make to prove convincingly that a regulation is worded as "simply and clearly as possible" and what if an adversely affected entity, using highly educated lawyers and consultants, could demonstrate that the regulation was readable at the 9th grade level but not the 8th grade level? What if simplicity and clarity conflicted, as they often do?

Third, we would create grave problems for the states, local agencies, tribes, universities, and others who are affected by our regulations and who would have to deal with both a deluge of new regulatory documents to review and with the potential consequences of missed deadlines and unpredictable legal outcomes. Under both Executive Order 12866 and Executive Order 12875 President Clinton has required all agencies to engage in significant outreach efforts to obtain the views of state, local, and tribal officials on regulatory issues that affect them. We strongly support this policy, but it adds time and complexity to

regulatory development. If these intergovernmental partners would have to review double the volume of regulatory documents, this outreach process would become badly overloaded.

Fourth, we would decrease our ability to focus on genuinely problematic regulations. Required to devote serious attention to the ninety percent of our existing regulations that pose no consequential problems, we would be forced to devote fewer resources to the small fraction that truly are outdated, ineffective, or unduly burdensome. In economics, there is a famous proposition called "Gresham's Law", that says that the circulation of weak money will debase and drive out strong money. Similarly, I think that the circulation of hundreds and thousands of unnecessary regulatory review packages will inevitably weaken and undermine serious reform efforts.

I appreciate that the intent of H.R. 994 is to ensure that agencies do not miss important regulatory reform opportunities. HHS strongly supports that purpose. We believe, however, that there are other ways to achieve this purpose far more effectively and at much lower cost.

We need to focus our efforts on those regulations that in fact pose significant real world problems. This could be done in a number of ways. We could enlist public input or expert judgment as to which regulations create significant problems. As the bill suggests in section 5, we could focus review on "major" regulations with a burden on the economy of \$100 million or more (but, unlike the bill, limit the mandated process to such regulations rather than making them simply the first priority for review). The Congress could give us reform candidates, and hold us accountable for specific regulatory reviews, through committee suggestions and by giving us more flexibility to make changes when statutes are revised. Such review could also be done, as President Clinton has ordered, by asking each agency to exercise

its own judgment in deciding which regulations warrant reform, and then subjecting those recommendations to further Executive branch and, ultimately, public and Congressional scrutiny.

Whatever method is chosen, we urge that it not involve a lock-step, paper-laden process that does not focus on real reform opportunities. If H.R. 994 were to be enacted, the result would be a slower, more bureaucratic government that is more concerned about detailed procedural requirements than about achieving beneficial results for its citizens. Reducing burdensome regulation is too important a task to be diverted by useless paperwork, needless expense, and delay. We agree that some reform opportunities remain in the existing base of regulations. We would be pleased to work with the Congress in addressing these. However, we strongly believe that it would serve neither branch of government to subject the vast body of regulations which do little more than help grantees obtain funding, or help businesses comply with the law, to pointless reviews. Nor would it serve either branch of government if important protections of public health and important protections against waste and abuse were subjected to draconian uncertainty over technical compliance with procedural requirements.

I have attached, and would like to submit for the record, answers to the specific questions raised by Representative Cardiss Collins in her letter of March 29, 1995. These answers provide additional detail on the difficulties and workload burden involved.

Thank you.

Attachment to Testimony on H.R. 994: HHS Responses to written questions of Representative Cardiss Collins on the effect of H.R. 994

1. How many regulations are currently administered by your department?

The body of existing Federal regulations is contained in the Code of Federal Regulations or CFR. Three separate titles of the CFR contain regulations governing programs of the Department of Health and Human Services. These are:

- o Title 21: Food and Drugs (about 4,000 pages);
- o Title 42: Public Health (about 2,000 pages); and
- o Title 45: Public Welfare (about 1,500 pages).

(Until recently the Social Security Administration was also part of HHS. Its regulations are contained in Title 20: Employee Benefits). Each title of the CFR is subdivided into chapters, subchapters, parts, subparts and sections. For example, chapter 3 of title 45 contains the regulations dealing with Child Support Enforcement and part 304 in that chapter deals with Federal Financial Participation for Child Support Enforcement Programs. It is not possible to state how many regulations HHS administers because there is no standard definition of what constitutes a single existing regulation. If each part were to be considered an existing regulation, then the Department would administer 450 existing regulations. However, the length of a part may vary from a few pages to hundreds of pages, and a part would only sometimes be the unit of review the Department or the public would find useful in reviewing all HHS regulations.

2. How many final regulations have been issued by your Department in each year 1981 through 1994?

The Unified Agenda of Federal Regulations is the best and official source of data on completed rulemakings. It covers all "significant" rulemakings of the Executive Branch and most independent agencies. The number of final rules issued, including Social Security Administration rules, is shown below for the years for which we have data from the Agenda. These tallies include some significant notices (e.g., HCFA notices setting premium amounts, performance criteria for intermediaries, and limits of rates of hospital cost increases) which are never codified but are developed using the rulemaking process. These tallies also include a few FDA color additive approvals that are not regulations per se. There are, in addition, a substantial number of FDA actions that are not included in the Agenda because they relate to specific products rather than setting general

rules, or because they are relatively unimportant, technical rules.

There are more proposed rules each year than final rules because some proposals are found to be unnecessary, based on public comment and further deliberation by the Department, and because the Congress often changes the underlying legislation before a final rule can be completed. In total, about 200 HHS rulemakings a year are listed in the Agenda. The estimated number of final rules, by year, is as follows:

<u>Year</u>	<u>Number of Final Rules</u>	<u>Year</u>	<u>Number of Final Rules</u>
1984	78	1990	76
1985	77	1991	65
1986	80	1992	68
1987	83	1993	59
1988	77	1994	71
1989	46		

We would add that the regulatory data base maintained by the Office of Management and Budget shows a much higher number of "final rule" documents reviewed by OMB and published in the Federal Register. During the period 1982 through 1991, OMB shows an average of about 400 HHS documents a year. This listing includes not only a large number of technical rules issued by FDA, but also several hundred HHS grant solicitations published each year. There is a possibility that H.R. 994 would extend to these documents, though this would serve no useful purpose since these solicitations are almost always time-limited to a one-year period.

3. For those final rules issued by your department in each of the fiscal years 1981 through 1994, how many rules: establish new regulatory requirements; implement revisions to existing regulatory requirements; and eliminate regulatory requirements?

Most HHS regulations change over time. Most of our grant-in-aid programs are reauthorized every three or four years. Each reauthorization bill typically contains dozens of changes, large and small. In still other programs, such as Medicare, Medicaid, and Child Support Enforcement, the Congress enacts statutory changes almost every year that are aimed at generating budgetary savings, program reforms, or both. As a result, we are engaged each year in hundreds of rulemakings aimed primarily at updating our regulations to reflect new legislation.

In addition, the Congress enacts new programs or adds features to existing programs almost every year.

We estimate that 90 percent or more of HHS rules primarily implement changes to existing regulatory requirements, and that less than 10 percent primarily establish new regulatory requirements. In modifying existing rules we often eliminate existing requirements, but have no easy way to "count" for this. Very few rules are issued for no reason other than to eliminate existing rules, mainly because the Congress rarely eliminates existing programs and almost all rules implement statutory programs.

4. How many existing regulations has your department reviewed to determine whether they continue to serve the purpose for which they were originally issued?

As discussed in the answer to Question 2, we are engaged each year in about two hundred rulemakings aimed primarily at updating our regulations to reflect new legislation. Most of these rulemakings invite comments on both the base regulation and on the provisions proposed for change. As a result, we engage in a nearly continuous review of HHS regulations for the great majority of our programs. Over the 11 years for which we have data, almost 800 final rules have been issued (excluding grant solicitations and technical rules discussed above). Yet, as indicated above, there are only 450 parts of the CFR. As these numbers suggest, most of these parts have been revised a number of times in order to ensure that they continue to meet statutory purposes and to reflect our experience in administering our programs.

While we frequently review HHS regulations, not every area of regulation receives the same intensity of attention. In fact, we devote more attention to regulatory areas that involve serious problems or controversy. For example, one area the Department has focused attention on over the last decade is the approval process for new drugs. According to the Unified Agenda of Federal Regulations, there have been five revisions of regulations related to drug approval since 1983. These revisions have ushered in truly major reforms, with a key focus on expediting the approval of drugs likely to result in important therapeutic gains related to cancer, AIDS, heart disease, and other major diseases. On the other hand, regulations for programs that no longer exist may sometimes remain in the CFR for years, simply because they have no real world effects and it is not a priority to remove them given competing demands for agency time and resources. The regulatory review recently announced by the President and under way in the Department will provide a vehicle to "clean up" some of these obsolete regulations in a swift and streamlined way.

6. How many people would your department envision needing in order to carry out the requirements of H.R. 994 to review all existing and new regulations that are issued?

An internal HHS working group recently estimated that within HHS fewer than 100 people work on regulations full-time, another 100 people in the Office of General Counsel work at least half-time, and another 1,000 staff draft or review regulations on a part-time or intermittent basis. The group estimated that this would equate to 200 full time equivalent employees (FTE). As mentioned earlier, the Department currently issues about 200 proposed and final rulemakings a year.

In the response to Question 1, we estimated that the Department administers 450 "existing regulations", while qualifying that this is actually a very difficult, if not impossible, calculation to make. If each of these had to be reviewed over seven years, this would require approximately 65 reviews a year. In addition, each new final regulation, approximately 70 a year, would have to be reviewed after 3 years. So, the proposed law would require that 65 reviews a year be performed for three years after passage, increasing to 135 reviews in year four.

If a review of an existing regulation required on average the same number of person hours as the issuance of any other regulatory package, then the Department would need to devote 65 additional FTEs to regulatory review in the first three years of enactment, and 135 FTEs in year four and beyond. If it required on average as many person hours as the issuance of a final regulation, then several hundred FTE might be required (based on 200 FTE for 70 final rules, 65 sunset reviews would require about 200 FTE and 135 sunset reviews about 400 FTE).

We already review much of the base as we modify rules to reflect new legislation or other initiatives, and few of the newly reviewed rules are likely to involve controversy or significant. However, the 18-criteria review process and the increased vulnerability to judicial intervention would largely offset these factors. For example, the Department would have to determine on some considered basis whether each regulation was written as simply and clearly as possible (criterion (6)). Moreover, despite the effort HHS has made over the years to improve the clarity of its regulations, this review would likely result in a significant number of regulations needing at least some rewriting. Taking all of these factors into account, we "guesstimate" that as many as 100 additional FTEs would be needed by the fourth year if H.R. 994 were enacted in its present form. This does not include potential litigation workload.

7. What are the administrative costs your department would envision needing in order to carry out the requirement of H.R. 994 to review all existing and all new regulations that are

issued?

Using the estimated staffing needs of the required reviews from Question 6, and an average Federal employee salary and expense cost of approximately \$100,000, the Salaries and Expenses costs of the legislation would be roughly \$10 million annually. This does not reflect possible litigation costs.

8. What other comments do you wish to make about the legislation?

See the Department's testimony.

Mr. FOX. Thank you, Ms. Feder. Now, the testimony of James Gilliland, General Counsel, Department of Agriculture. Thank you.

**STATEMENT OF JAMES GILLILAND, GENERAL COUNSEL,
DEPARTMENT OF AGRICULTURE**

Mr. GILLILAND. Thank you, Mr. Chairman, Mr. Vice Chairman, members. I'm glad to be down here to testify in connection with H.R. 994. We at USDA are very much involved in the regulatory world. We have not simply six major statutes, as my colleague on the right has, but we have literally dozens of them, and approximately 26,000 sections in the CFR.

We touch a number of different areas by reason of the breadth of the programs from agriculture, conservation, rural development, food safety, food nutrition, school lunches—a very broad segment of the American public. We have a broad constituency, whom we deal with on a regular basis, and we think, generally, fairly cooperatively and successfully. We agree with the objective of constant attention to avoid unnecessary regulation.

We believe the answer lies, as it does in business, in good management, as distinguished from complex and potentially uncertain rules. You have my statement for the record, but I'd like to hit a couple reasons why. First, we already have a regulatory review process. If I were to characterize it in two words, I'd say it works. Our criteria in this—I would list the six criteria which we have, which I would commend.

First, the continued need for the rule. Second, the nature of the comments received from the public, concerning the rule. Third, the complexity of the rule. Fourth, the extent to which the rule overlaps, duplicates or conflicts with other Federal rules and, to the extent feasible, with the State and local rules in that area.

Fifth, the length of time since the rule has been evaluated and the degree to which technology, economic condition or other factors have affected the areas involved in the rule. And sixth, the extent to which there exists an opportunity to reduce the burdens, while still achieving regulatory objectives and requirements.

In addition to our internal rule at USDA, there is also Executive Order 12866, which the President signed a couple of years ago, under which the processes have been tremendously improved. Miss Katzen has testified in that area, so I shan't pursue it. And of course, last, as the world knows, the President is undergoing having us work on the regulatory reinvention process now, wherein we review every single reg, every notice that occurs in our area in the CFR.

We're taking that seriously. It's a page-by-page review, and we are reviewing each page, each section, and that is the essence of good management. So basically, in addition to the problems which Miss Feder and Mr. Richards have given you so far, there's no fundamental reason for the bill. The regulatory process that we have works.

To better understand the process within the USDA, one should note that over half of our regulations are involved in agriculture marketing areas. We're responsible for regulatory items with regard to specific fruits, vegetables, commodities, commodity grading and promotion orders. In our process, new marketing orders and

regulations and their elimination are normally requested by the regulated industry.

Let me say it again: The industry comes to us with the request for modification or for new regulations. That is the way in which it normally occurs, and we respond. This leads to the objective of the programs, which is certainty and simplicity. I recommend to you, gentleman and Mrs. Slaughter, that certainty and simplicity are guidelines that you should follow.

We don't believe that H.R. 994 gives us this. It gives us, rather, complexity and elements of uncertainty beyond simply the litigation aspects of it—the uncertainty of what happens when you've got thousands of regulations that we would have, and you become involved, you either miss one, or certain other things happen. These are human factors. This is a significant risk, as well.

I submit to members of the committee that H.R. 994 is not the best way to go. Thank you.

[The prepared statement of Mr. Gilliland follows:]

STATEMENT OF JAMES S. GILLILAND
GENERAL COUNSEL
OFFICE OF THE GENERAL COUNSEL
UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE
SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH,
NATURAL RESOURCES, AND REGULATORY AFFAIRS
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

May 2, 1995

Good morning Mr. Chairman and Members of this Subcommittee. It is my pleasure to be here to discuss H.R.994, the "Regulatory Sunset and Review Act of 1995." This bill would require agencies to regularly review their regulations and make recommendations to terminate, continue in effect, modify, or consolidate those regulations. The bill provides for the termination of regulations for which the agency fails to conduct regulatory reviews, and provide reports and make recommendations to Congress and the Office of Information and Regulatory Affairs (OIRA) as required in the bill.

The Department of Agriculture is committed to eliminating regulations that are outdated, ineffective, or unduly burdensome and to streamlining and simplifying regulations that must be retained. In accordance with section 5 of Executive Order 12866, the Department developed a program under which it periodically reviews its existing significant regulations to determine whether any of those regulations should be modified or eliminated to make the Department's regulations more effective, less burdensome, or in greater alignment with the President's priorities and the principles set forth in Executive Order 12866. In addition, prior to the issuance of Executive Order 12866, the Department adopted internal guidance which mandates the review of

Department regulations on an ongoing basis to accomplish the goal of reduction of regulatory burdens. Under Secretaries and Assistant Secretaries are responsible for assuring that regulatory reviews are conducted and appropriate action is taken based upon these reviews. The Department's criteria for review of regulations include: (1) the continued need for the rule; (2) the nature of the comments received from the public concerning the rule; (3) the complexity of the rule; (4) the extent to which the rule overlaps, duplicates, or conflicts with other federal rules, and, to the extent feasible, with state and local rules; (5) the length of time since the rule has been evaluated and the degree to which technology, economic conditions, or other factors have changed in areas affected by the rule; and (6) the extent to which there exists the opportunity to reduce burdens while still achieving statutory objectives and requirements. After reviews are completed, agency heads are required to determine whether regulations should be continued without change, revised, or eliminated, and take appropriate follow-up action.

In addition to these internal Department procedures, we are currently engaged in an intensive effort to review every regulation administered by the Department. On March 4, 1995, President Clinton, in a memorandum to heads of agencies, directed a page-by-page review of all agency regulations now in effect and the elimination or revision of all regulations that are outdated or otherwise in need of reform.¹ The

¹ Memorandum for Heads of Departments and Agencies entitled "Regulatory Reinvention Initiative," March 4, 1995.

criteria for the review directed by the President include: (1) the need for the regulation; (2) the existence of private sector alternatives, such as market mechanisms, that can better achieve the public good envisioned by the regulation; (3) the ability of state or local governments to do a better job; (4) the ability of the private sector to accomplish the goals of the regulation by setting its own standards, subject to public accountability; and (5) the existence of a more efficient or less intrusive way in which to achieve the goal of the regulation. The President set a date of June 1, 1995, for agencies to send him a report identifying those regulations that can be modified or eliminated administratively and those that require legislative authority for modification or elimination.

On March 10, 1995, then Acting Secretary Rominger initiated Department-wide activities necessary to implement the President's regulatory review initiative. The Department has divided its regulations into manageable segments, appointed teams to review each segment of the regulations, and required each team to report its findings for Department level review by May 8, 1995. The report must identify all regulations that can be eliminated, modified, streamlined, or clarified. Each team must provide a justification for those regulations which the team determines must be retained.

The Department takes very seriously the need to review regulations. While we agree with the objectives of H.R.994, we do not believe that H.R.994 provides an effective or efficient means of assuring that

unnecessary regulations are eliminated. Specifically, we believe that the scope of H.R.994 is too broad, the criteria for regulatory review in H.R.994 are not appropriate for all regulations, the reporting requirements imposed on agencies by H.R.994 will divert Department resources from the important task of regulatory review, and the termination of agency regulations for failure to comply with H.R.994 could endanger the public and disrupt the regulated community.

Scope H.R.994 provides that every regulation issued by the agency shall terminate, unless the agency conducts the required review. "Regulation" is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy, other than such a statement to carry out a routine administrative function of an agency." This definition appears to include more than just those documents published in the Federal Register. Instead, the definition could be read to include all written agency statements created to implement regulatory programs. These include all internal guidance and enforcement manuals relied upon by agency staff, and written manuals, interpretative guidance, and forms provided to the public.

While we agree that all such documents should be reviewed periodically, we do not believe that an agency should be statutorily mandated to conduct simultaneous reviews of Federal Register material and all the underlying program material. The resources of the agency cannot be stretched to do everything at once and reviewing published regulations

should be given priority. These are the main statements of agency policy concerning program administration and we should first focus agency resources on these documents.

Criteria for Review Section 4(b) of H.R.994 would require agencies to review, make recommendations, and terminate or extend the effectiveness of regulations under 18 specific criteria for review. Many of the criteria make sense. However, we do not believe that all of the criteria should be made applicable to the review of all Department regulations.

For example, over half of the Department's regulations are promulgated for agricultural marketing purposes. These include regulations for operating specific fruit, vegetable, and dairy marketing orders, various commodity research and promotion orders, and voluntary commodity grading programs. New agricultural marketing regulations and the modification or elimination of existing agricultural marketing regulations are requested by the regulated industry. These industry proposals are considered in a formal rulemaking process administered by the Department. H.R.994 would require the Department to review marketing order regulations using the 18 criteria and substitute a Departmental decision-making process for an industry-generated process. This would seem to be contrary to one of the goals of regulatory reform.

Further, we believe that the criteria specified in the Department's internal guidance for regulatory review, which I described earlier, are more appropriate for the review of Department regulations than the one-size-fits-all criteria specified in H.R.994. Not only are the Department's criteria much more flexible than the criteria in H.R.994, but they do not apply to rules proposed by the regulated industry which are developed through the formal rulemaking process. In addition to the six criteria listed in the Department's internal guidance, agencies within the Department may apply other criteria to the regulatory review process as they believe are appropriate to the particular rule or regulatory program.

Reports H.R.994 would require agencies to review every regulation they have issued or will issue after three years for rules that take effect after the enactment of H.R.994 and every seven years for rules that are effective on or before the date of enactment of H.R.994 or have been extended after a review in accordance with H.R.994. A preliminary report on the findings and proposed recommendations of the review are to be submitted to Congress and published in the Federal Register 120 days before the termination date of the regulation under review. Appropriate committees of Congress then have a 60-day period in which to comment on the preliminary report, and the Administrator of OIRA must evaluate each preliminary report for quality, interagency consistency, and proper application of the 18 criteria listed in H.R.994.

The Department would then be required to review and consider the comments it receives from Congress and OIRA. After the 60-day comment period, but not later than 60 days before the termination date, the Department would be required to submit to Congress and publish in the Federal Register a final report on the findings and recommendations of the agency regarding the extension of the effectiveness of the regulation and any appropriate modifications to the regulation. The final report must include a full justification of the decision to extend or modify the regulation and the factual basis for all determinations made with respect to the extension or modification under the 18 criteria set forth in section 4(b) of H.R.994.

The amount of review required by this legislation, and the resources required to reconsider, redraft, and report is excessive. The regulations published by the Department cover approximately 11,000 pages in the Code of Federal Regulations. All of these regulations would have to be screened for compliance with the 18 review criteria, at a level of analysis which will be subject to judicial review. To layer onto that screening burdensome reporting requirements simply adds additional levels of bureaucratic review which will divert Departmental resources from the important task of analysis and redrafting of agency regulations with little additional benefit.

Termination of Department Regulations H.R.994 provides for the automatic termination of regulations when an agency fails to: (1) conduct a review; (2) publish a preliminary report and proposed

recommendations; (3) review and consider comments on the preliminary report; and (4) publish a final report in accordance with section 3(a) of H.R.994.

Undoubtedly, the automatic termination would have the effect of ensuring that the Department makes every effort to comply with the burdensome tasks imposed by H.R.994. However, should the Department fail to meet the requirements of H.R.994, through a lack of resources, then an entire regulatory program may end as well. Unless the Department possesses the resources necessary to reinstate the regulation, there will be a loss to the regulated community of the certainty that the regulation provides, and the loss of public protection provided by the regulation.

* * * * *

H.R.994 does not provide for an efficient, systematic, and responsible review of existing Department regulations. Executive Order 12866, the Department's existing guidance, and the President's regulatory reform initiatives will accomplish the goals of H.R.994 without the waste of precious resources on reporting requirements and evaluation of all rules and related documents using inapplicable or inappropriate review criteria. Current regulatory review procedures permit careful review without the possibility of the inappropriate termination of regulatory programs which protect the public. Reliance on administrative review

processes rather than the rigid provisions of H.R.994 will ensure that guidance to the regulated community will be consistent and reasonable.

Thank you, Mr. Chairman. I am happy to answer your questions.

Mr. Fox. Thank you, Mr. Gilliland. And now, Edward Knight, General Counsel, Department of the Treasury.

**STATEMENT OF EDWARD KNIGHT, GENERAL COUNSEL,
DEPARTMENT OF THE TREASURY**

Mr. KNIGHT. Thank you, Mr. Chairman and members of the committee. I have a written statement I would like placed in the record, and I'll just briefly summarize. I think it's fair to say that the Treasury Department is one of the more diverse departments in the Federal Government. Its responsibilities and missions go from raising revenue, to protecting the safety and soundness of our banking system, to extensive law enforcement responsibilities.

When you ask the question of how this piece of legislation affects the Treasury Department, you must have a little bit of background about the Treasury Department and its responsibilities and the diversity of those responsibilities. And I want to touch briefly upon those today, and also to give you some examples of how we feel this might impact upon the Department, and some of the things we've been doing in response to the public's interest in better regulations, and Congress' interest.

But as a general matter, I have to start by saying that we concur in the statements of Sally Katzen, the Administrator of the Office of Information and Regulatory Affairs at OMB, as presented on March 28 before this subcommittee. The Department is in full agreement with her position and those views. But as I said, Treasury regulations are issued by a number of offices and bureaus.

Just to give you some examples, one everyone is familiar with, of course, is the Internal Revenue Service, which issues regulations to interpret and implement the Internal Revenue Code of 1986 and related statutes, and to collect about \$1 trillion in revenues annually. The Bureau of Alcohol, Tobacco, and Firearms issues regulations to fulfill its statutory mandates to enforce the Federal laws relating to the manufacture, commerce, and taxation of alcohol products, tobacco products, firearms, and explosives.

The Customs Service issues regulations to administer the laws concerning the importation of merchandise into the United States and to collect over \$25 billion a year. The Office of the Comptroller of the Currency and the Office of Thrift Supervision issue regulations to supervise and ensure the safety and soundness of national banks and thrifts. The Financial Crimes Enforcement Network implements antimoney-laundering laws and related authorities.

The Office of Foreign Assets Control (OFAC) issues regulations to implement economic sanctions against foreign countries imposed pursuant to Presidential order or mandated by legislation. OFAC has regulations currently implementing unilateral and multilateral trade and financial sanctions against Cuba, Iran, Iraq, and other countries. In fact, terrorism is one of several areas where Treasury's bureaus work in partnership toward a common policy goal.

Our enforcement bureaus protect the most visible terrorist targets in the United States: the President, the Vice President, and other officials. We enforce laws directed at the most common instruments of terror, protect against the smuggling of weapons, and enforce economic sanctions against countries and groups that promote terrorism.

Generally, of course, we all agree that principles of good government and sound regulatory policy demand that agencies periodically review their regulations, and we do that at Treasury. We spend a lot of time doing that. We're committed to principles of revising regulations and making these regulations work for the public. And the President has taken many steps in these areas.

In March, as I'm sure you're aware, he directed each agency to review its regulations to identify requirements that can be eliminated or modified. And Treasury strongly supports this initiative and has been spending much time and effort in the recent weeks working on it. But this is something we've been doing for some time.

I just want to give you a few examples of what the agencies and bureaus within the Department are doing. In 1994, the IRS completed revising its regulations concerning nondiscrimination requirements for pension plans, which affect just about every American. The resulting regulations are significantly shorter and simpler, and enabled the IRS to revoke over 80 revenue rulings.

In the past 2 years, the IRS, under Peggy Richardson's leadership, has simplified 15 major tax forms. These changes have eliminated over 46 million hours of paperwork for more than 134 million taxpayers.

Gene Ludwig, at the Office of the Comptroller of the Currency, has been reviewing each of its 29 regulatory parts. And this is something that's been going on since day one at the OCC. When completed, this project will have simplified dozens of regulatory and paperwork requirements. The Financial Crimes Enforcement Network is working closely with other financial institutions and is re-engineering its regulations and reporting requirements.

The Customs Service is subject to a new statute that Congress passed last year that changes the Tariff Act of 1930 and mandates modernization, including a review of its regulations. And this review, we estimate, will result in about 90 percent of its regulations being updated in the near term. In addition to regulatory review, we're doing outreach with our customers.

In the last few weeks, we've had 26 outreach meetings across the country, where senior regulators have been meeting with the regulated community. And this is part of a long-standing practice at Treasury to develop partnerships with the regulated community. And we intend to follow up on that in at least 40 different areas of regulatory reform.

H.R. 994 has to be viewed against this diverse background of the Treasury Department, its diverse responsibilities, and the amount of activity it has been focusing on in regulatory reform in the last few months—and years, for that matter.

Although H.R. 994's underlying principle of periodic regulatory review is sound to regulatory policy, the approach of the legislation, we believe, is seriously flawed. First, the scope of the bill is very, very broad, so as to encompass practically anything any agency or bureau would do, no matter what the significance or insignificance. Second, Treasury will have to devote an enormous amount of resources, as other individuals have attested to today, in order to comply with this bill.

Third, the bill does not recognize the architecture of the Federal rulemaking process and is likely to have unintended and harmful consequences. Finally, the ultimate potential consequence of the bill, a regulatory death penalty and the automatic termination of agency regulations, is not in the best interest of the public.

The term "regulation" in the bill, would encompass things like legal opinions and very detailed regulations that we don't feel the legislation is intended to cover.

It would have unintended consequences that we think would be harmful. Let me just give you one example. Each year, taxpayers request guidance from the IRS regarding the proper tax treatment of particular transactions. In just the last 3 years, the IRS has issued over 7,000 private letter rulings and technical advice memoranda. These are requests from the public for information, for guidance, to interpret a tax code that the Congress has passed that is over 7,000 pages long.

They need this guidance. They want this guidance. Under this legislation, this guidance would be subject to this review and, in many cases, terminated, to the harm of the public, causing, for instance, the vague and technical code to spring back into action and the public not to have the benefit of the information and guidance that they want here.

Mr. FOX. We gave you lawyers 5 minutes.

Mr. KNIGHT. All right.

Mr. FOX. No problem.

Mr. KNIGHT. We have a very big department here with a lot of different impacts, and—

Mr. FOX. I can see—I appreciate your points.

Mr. KNIGHT [continuing]. And I will—can you give me 1 more minute?

Mr. FOX. Well, you know what? If you can, because we have two more witnesses, and we have the colleagues that want to take questions.

Mr. KNIGHT. All right.

Mr. FOX. Would you include that in your answer to your first question?

Mr. KNIGHT. Pardon me?

Mr. FOX. Can you summarize it in 15 seconds?

Mr. KNIGHT. I can summarize by saying, Congressman, that we feel that much of this legislation would end up harming the public.

Mr. FOX. Got it.

Mr. KNIGHT. That what the public wants from us is more information, often, and guidance. And our regulations give them that. And we are already going about the job of reforming these regulations in a way that I think is consistent with the general intent of this legislation, what Congress wants us to do.

[The prepared statement of Mr. Knight follows:]

STATEMENT OF EDWARD S. KNIGHT
GENERAL COUNSEL
DEPARTMENT OF THE TREASURY
BEFORE THE SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH,
NATURAL RESOURCES, AND REGULATORY AFFAIRS
OF THE
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

May 2, 1995

Mr. Chairman and members of the Subcommittee, I am pleased to present the views of the Department of the Treasury on H.R. 994, the "Regulatory Sunset and Review Act of 1995."

H.R. 994 would provide for the automatic termination of each existing agency regulation at the end of 7 years, and each new regulation at the end of 3 years. A regulation would not terminate if

(1) the issuing agency solicits and considers public comment on whether the regulation should be continued or terminated in light of the 18 criteria specified in the bill, (2) the agency conducts an in-depth review of the regulation, (3) the agency submits to the President, OMB, and the Congress and publishes in the *Federal Register* a preliminary report of that review, (4) the agency considers comments to the preliminary report received from Congress and OMB, and (5) the agency submits to the Congress and publishes in the *Federal Register* a final report together with a notice extending the regulation, with or without modifications. Thereafter, each regulation would continue to terminate on a 7-year cycle unless the agency repeats this process.

As you know, on March 28, Sally Katzen, the Administrator of the Office of Information and Regulatory Affairs at OMB, appeared before the Subcommittee to present the Administration's views on H.R. 994. The Department of the Treasury is in full agreement with those views. Today, I would like to present you with a brief overview of the regulatory responsibilities of the Department of the Treasury and discuss how H.R. 994 could affect the Department and its regulatory programs.

Treasury regulations are issued by a number of offices and bureaus that have distinct and critical regulatory responsibilities:

The Internal Revenue Service (IRS) issues regulations to interpret and implement the Internal Revenue Code of 1986 and related tax statutes, and to collect about \$1 trillion in taxes annually. The IRS accounts for about 50 percent of Treasury's informal rulemaking under the APA.

The Bureau of Alcohol, Tobacco, and Firearms (BATF) issues regulations to fulfill its statutory mandates to enforce the Federal laws relating to the manufacture, commerce and taxation of alcohol products, tobacco products, firearms and explosives.

The United States Customs Service issues regulations to administer the laws concerning the importation of merchandise into the United States, to collect over \$25 billion in duties annually, and to enforce the laws prohibiting smuggling and trafficking in narcotics and other contraband.

The Office of the Comptroller of the Currency (OCC) and the Office of Thrift Supervision (OTS) issue regulations necessary to supervise and to ensure the safety and soundness of national banks and savings associations.

Regulations of the Bureau of the Public Debt establish the terms and conditions for the sale and redemption of savings bonds and marketable Treasury securities, protect the integrity, liquidity and efficiency of the government securities market and insure investor protection.

Regulations of the Financial Management Service (FMS) are designed to improve government financial management.

The Financial Crimes Enforcement Network (FinCEN) implements the anti-money laundering and related authorities of the Secretary under the Bank Secrecy Act.

The Office of Foreign Assets Control (OFAC) issues regulations to implement economic sanctions against foreign countries imposed pursuant to Presidential order or mandated by legislation. OFAC regulations currently implement unilateral or multilateral trade and financial sanctions against Cuba, Iran, Iraq, Libya, North Korea, Serbia, UNITA (Angola) and terrorist groups threatening the Middle East peace process.

Other components of the Department occasionally issue regulations. These include the United States Secret Service, the Bureau of Engraving and Printing, the Office of the General Counsel, and the offices of several assistant secretaries of the Treasury.

In fact, terrorism is one of several areas where Treasury's bureaus work in partnership towards a common policy goal. Our enforcement bureaus protect the most visible terrorist targets in the United States, enforce laws directed at the most common instruments of terror, protect against the smuggling of weapons of mass destruction, and enforce economic sanctions against countries and groups that promote terrorism.

We all agree that principles of good government and sound regulatory policy demand that agencies periodically review their existing regulations. We must all work to ensure that they are necessary and working as intended, reflect current statutory authority, and impose the least burden on the public consistent with legitimate regulatory objectives. These principles are embodied in the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), which requires agencies to conduct a review every 10 years of regulations that have a significant economic impact on a substantial number of small

businesses, and the Paperwork Reduction Act (44 U.S.C. 3501 et seq.), which requires agencies to review each reporting and recordkeeping requirement - including those contained in regulations - not less frequently than every 3 years.

This Administration is committed to these principles even if they are not required by law. The President took the additional step in March of directing each agency to review its regulations to identify requirements that can be eliminated or modified to make them less burdensome, as well as statutory impediments to regulatory reform. Not only does Treasury strongly support this initiative, but regulatory review has been a practice at Treasury for many years. Let me review some recent history:

In 1994, the IRS completed revising its regulations concerning nondiscrimination requirements for pension plans. The resulting regulations are significantly shorter and simpler, and enabled the IRS to revoke over 80 revenue rulings based on the prior regulations.

Also in 1994, the IRS issued revised regulations relating to the definition of "activity" for purposes of the limitation on deducting losses from passive activities. The old regulations consisted of over 100 rules in about 40 pages in the *Code of Federal Regulations* (CFR); the new regulations contain about 15 rules in less than 2 pages.

In the past two years, the IRS has simplified 15 major tax forms. These changes have eliminated over 46 million hours of paperwork for more than 134 million taxpayers.

The Bureau of the Public Debt recently repealed two obsolete CFR parts.

The Office of the Comptroller of the Currency has been reviewing each of its 29 regulatory parts in the Code of Federal Regulations. When completed, this project will have simplified dozens of regulatory and paperwork requirements affecting both large and small financial institutions. A similar project is about to get underway at the Office of Thrift Supervision.

The Financial Crimes Enforcement Network, working closely with financial institutions, is engaged in a basic re-engineering of its regulations implementing anti-money laundering objectives of the Bank Secrecy Act. Reporting requirements are being eliminated or reduced for a wide range of banks and non-bank financial institutions. In addition, FinCEN recently withdrew two final rules and two proposed rules after determining that they were either unnecessary or imposed disproportionate burdens on banks or other financial institutions.

The Customs Service is implementing the Customs Modernization Act, which substantially revised the Tariff Act of 1930 to reflect the changes in trade, transportation, and communication and information technology that have occurred over the past 6 decades. As a result of this legislation, Customs estimates that about 90 percent of its regulations will be updated in the near term.

BATF is nearing completion of a recodification and revision of its regulations governing the tax credit on alcohol not used in alcoholic beverages. Among other things, the final regulation is expected to reduce the amount of documentation that must be submitted in support of a tax credit claim by 75 percent.

BATF has reduced reporting requirements for small brewers by over 70 percent, and for small wine producers by over 60 percent.

Regulatory review is but one component of Treasury's regulatory reform program. We are also actively engaged in implementing the President's other regulatory reform initiatives:

We have just completed a series of 26 outreach meetings across the country between our senior regulators and those subject to Treasury regulations. These meetings reconfirm Treasury's long-standing practice of developing partnerships with the regulated community. And in the coming months, we expect to begin developing more than 40 regulatory projects in partnership with our regulated public.

We are developing policies to expand our programs that waive or mitigate regulatory fines or penalties imposed on first time small business violators, and to focus regulatory enforcement and compliance personnel on results instead of process and red tape.

Also, we are working to reduce the frequency of regularly scheduled reporting requirements.

H.R. 994's impact on Treasury must be viewed from this background. We have concluded that although H.R. 994's underlying principle of periodic regulatory review is integral to sound regulatory policy, the approach taken is seriously flawed.

First, the scope of the bill is so broad as to encompass practically any agency activity - no matter what the significance or insignificance - that affects the public in some manner.

Second, Treasury will have to divert an enormous amount of resources in order to comply with the bill.

Third, the bill does not recognize the architecture of the Federal rulemaking process and is likely to have unintended and harmful consequences.

Finally, the ultimate potential consequence of the bill - a regulatory death penalty in the form of the automatic termination of agency regulations - is not in the best interests of the public or consistent with sound public policy.

Let me explain each of these points.

As defined in the bill, the term regulation means "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy, other than such a statement to carry out a routine administrative function of an agency." It is difficult to imagine what is not covered by this definition. This definition encompasses what most of us generally recognize as agency regulations: Those documents issued pursuant to the informal rulemaking procedures of the APA (or under an APA exemption) that are published in the *Federal Register* and codified in the *Code of Federal Regulations*. At Treasury, these regulations range from the very simple (such as a BATF regulation designating a particular geographic winegrape growing region as a viticultural area) to the very complex (such as an IRS regulation interpreting a complex provision of the Internal Revenue Code or an OCC or OTS regulation prescribing capital requirements for financial institutions).

But H.R. 994's definition of "regulation" goes well beyond APA rulemakings. Other Treasury "statements" that implement, interpret or prescribe law or policy include a wide range of agency activities such as legal opinions and legal briefs prepared in support of a civil or criminal enforcement action; IRS private letter rulings, revenue rulings and revenue procedures; rulings and similar documents issued by the Customs Service; internal guidance and enforcement manuals relied on by agency staff; agency enforcement actions; as well as licenses, permits and other agency authorizations to engage in a particular activity.

Under the bill, every agency internal legal opinion that ever interpreted the scope of a statute or analyzed the applicability of a statutory or regulatory requirement to a particular set of facts is within the definition of "regulation." Legal opinions form the very foundation of virtually all of the operations, functions and programs of Federal agencies. Similarly, the definition is so broad as to encompass pleadings, briefs and other documents prepared in the context of civil and criminal litigation.

Under this legislation, taxpayers and the IRS would be particularly affected. Each year, taxpayers request guidance from the IRS concerning the proper tax treatment of particular transactions. In just the last three years the IRS issued over 7,000 private letter rulings and technical advice memoranda that can be relied on by the requesting taxpayer, as well as over 500 revenue rulings and revenue procedures providing guidance on matters of interest to wide range of taxpayers. Each one of these rulings, which interprets how the tax law applies to a specific transaction or a category of transactions, is a regulation within the meaning of H.R. 994.

When an agency determines to take an enforcement action against a particular person, that action is necessarily predicated on an agency determination that there has been a violation of law or an agency regulation having the force of law. For example, a deficiency notice issued to a taxpayer by the IRS is generally based on a determination that a particular transaction was not entitled under law to the tax treatment claimed by the taxpayer. Under H.R. 994, such a deficiency notice would be a "regulation" because it is an agency statement that implements or interprets the law.

Like the IRS, the Customs Service receives requests for guidance. In response, Customs issues approximately 9,500 ruling letters annually that give the trade community guidance on issues relating to imported merchandise.

Under the Customs laws, a domestic interested party may file a petition requesting the Customs Service to reconsider the tariff classification of specific categories of imported merchandise. Customs responds to these petitions by publishing a notice in the *Federal Register* and soliciting public comment on what are often highly complex technical issues. After reviewing the public comments, Customs publishes a final ruling in response to the petition. Every existing Customs ruling on a domestic interested party petition is a "regulation" subject to the provisions of H.R. 994.

In determining whether to grant a license, permit or other authority, Federal agencies often must determine whether the applicant is entitled by law to receive the license, permit or other authority. In these cases, the issuance or denial of an application is a "regulation" because it constitutes an agency statement that interprets or implements law.

For example, the Federal Alcohol Administration Act provides that no label can be placed on a container of distilled spirits, wine or malt beverage unless the label is approved by BATF. When reviewing a request for a label approval, BATF determines whether the label complies with the law and BATF's implementing regulations. BATF has approved about 1.5 million labels, each of which would be a "regulation" subject to the procedures of H.R. 994.

Even the exemption in the bill for routine administrative functions provides agencies with little assurance that such actions will not become subject to the review required by the bill. Coupled with the explicit authorization of judicial review of agency compliance with the procedures required by the bill, agencies will be forced to review routine administrative actions to avoid the possibility that a judge somewhere will decide that a particular function is neither administrative nor routine.

Regardless of how simple or complex, or whether a serious question has ever been raised about its necessity or burdens, H.R. 994 would apply to all of the activities I have just described. This one-size-fits-all approach to regulatory review only serves to divert scarce agency resources away from the real regulatory priorities. We are focused - and we should keep our focus - on reviewing and revising those regulations that do impose significant costs or heavy regulatory burdens and those new regulations that are needed to provide the public with guidance on how to comply with the laws enacted by the Congress. For example:

Although BATF label approvals do not expire, each of the 1.5 million existing approvals would terminate at the end of 7 years unless BATF followed the procedures prescribed by H.R. 994. Under the bill, BATF would be required to review an average of almost 215,000 existing label approvals every year. This would be in addition to processing the approximately 60,000 requests for new label approvals received annually, and reviewing each newly-granted label approval by the end of 3 years and thereafter on a 7-year cycle.

Under the bill, each regulation that an agency ever issued in the past to eliminate an existing regulation or to repeal an existing regulatory requirement is itself an existing regulation subject to periodic review. The task of identifying each such regulation would be an undertaking of substantial proportions.

We seriously question whether diverting scarce staff resources to tasks such as these is a wise use of taxpayer money.

H.R. 994 does not recognize the architecture of the Federal rulemaking process and is likely to have unintended and harmful consequences. The bill fails to distinguish between regulations published in the *Federal Register* and regulations codified in the CFR. Other than perhaps the first time Treasury develops a regulation to

implement a new statute or provision of law, a Treasury regulation published in the *Federal Register* rarely represents a complete regulatory program. The typical Treasury regulation appearing in the *Federal Register* is not a free-standing regulation; instead, it eliminates, amends or adds to one or more existing provisions of the CFR. These *Federal Register* documents are subsumed when they are codified in the CFR.

The CFR consists of volumes, chapters, subchapters, parts, subparts, sections, paragraphs, etc. Which of these is the equivalent of a "regulation" for purposes of the review required by H.R. 994?

In other words, where does a particular regulation begin and where does it end? If one section contains a cross-reference to a definition or a requirement in an otherwise unrelated section, would the cross-referenced section and the regulation in which it is embodied have to be reviewed at the same time as the cross-referencing section and the regulation in which it is embodied? Is an agency review invalid if a court determines that the agency should have included more (or fewer) CFR provisions within the review in order to more fully assess the impact of the "regulation" with respect to the 18 review criteria listed in H.R. 994?

Suppose a regulatory provision already codified in the CFR on the date of enactment of H.R. 994 is amended by a final rule published in the *Federal Register* a year after the date of enactment. Under the bill, the regulation as it existed in the CFR on the date of enactment must be reviewed within 7 years. However, the bill also requires that the final rule revising that regulation be reviewed within 3 years. This puts different provisions in the same component of the CFR on different review schedules, the practical effect of which is to compress H.R. 994's review cycle from 7 years to 3 years after a CFR component is revised.

Given the enormously broad scope of H.R. 994, we cannot assure you that we will have sufficient resources to complete all of our reviews within the prescribed time periods, that something will not be inadvertently overlooked, or that a court might not find fault with the procedures or substance of a particular review. If any one of these situations were to occur, the bill provides that the affected regulation would thereafter have no force or effect without any consideration of the consequences. While the automatic termination of regulations sound appealing, it is contrary to sound public policy and the best interests of the public. For example:

Terminating IRS regulations, revenue rulings and private letter rulings will remove the certainty taxpayers need to comply with the law. Even if a tax regulation terminates, the underlying provision of the tax code remains in effect. The absence of this kind of guidance - which informs IRS revenue agents as well as taxpayers - will result in individual revenue agents determining whether a particular taxpayer has complied with the law and will increase the likelihood that similarly situated taxpayers will be treated differently. What taxpayers need is certainty; H.R. 994 would remove the certainty provided by IRS regulations and rulings.

Terminating IRS deficiency notices would have disastrous implications for the administration of the tax code. It would provide a strong incentive for taxpayers to prolong disputes with the IRS or refuse to enter into voluntary agreements to keep a tax year "open" pending resolution of a dispute.

Treasury's Bureau of the Public Debt issues regulations establishing the terms and conditions of the sale and redemption of marketable Treasury securities and savings bonds. This includes the 30-year "benchmark" bond, intermediate term Treasury notes, and bills. These regulations govern the procedures for Treasury auctions and set out the contract between the Government

and the investor. By raising the mere possibility that these regulations could terminate, H.R. 994 could raise questions about whether Treasury auctions will be disrupted and how the United States will meet its contractual commitments on the securities. This uncertainty could seriously impair the liquidity of the government securities market and could force the Federal Government to pay higher interest rates to compensate investors. Because many other interest rates are tied to Treasury borrowing rates, consumers may well be faced with higher rates on home mortgages and other loans.

Terminating private letter rulings issued by the Customs Service will remove the certainty demanded by the trade community for sound business planning.

FinCEN regulations implementing the Bank Secrecy Act are the core element of Treasury programs to fight money laundering and financial crime. The information derived from these regulations is utilized by Federal, State, local and international law enforcement organizations. Termination of these regulations would produce a gap through which drug dealers, weapons traffickers and terrorists could move funds with no fear of detection.

The Office of Foreign Assets Control (OFAC) issues regulations implementing economic sanctions against foreign countries or terrorist groups imposed in response to threats to the U.S. foreign policy, national security, or economy. These regulations constitute the direct exercise of the President's foreign policy powers. OFAC sanctions programs affect countries such as Cuba, Iran, Iraq, Libya, North Korea, and Serbia, and Middle East terrorist groups. Any termination of an OFAC regulation would seriously undermine the President's conduct of the foreign policy of the United States.

Terminating regulations issued by OCC or OTS that govern the safety and soundness of financial institutions will threaten the integrity of federally insured financial institutions and put Federal deposit insurance funds at risk.

More problematic is what could happen if a final rule that was published in the *Federal Register* and that revised an existing CFR provision terminates under the provisions of H.R. 994. For example, suppose the IRS issues a new regulation that revises an existing CFR provision to simplify regulatory burdens or to provide a more favorable tax treatment for certain transactions. What happens if, for some reason, that final rule ceases to have any force or effect by operation of H.R. 994? It is very likely that the more onerous pre-revision regulatory provisions spring back into force. The potential for uncertainty and confusion on the part of the public is real, particularly when highly technical or complex underlying statutory provisions implemented or interpreted by a regulation continue to have effect.

In closing, the Department of the Treasury strongly endorse the concept that agencies should review their regulations to eliminate unnecessary provisions and reduce paperwork and regulatory burdens whenever that can be accomplished consistent with law and sound regulatory policy. H.R. 994, however, is not the answer. It is too broad in scope. Its automatic termination provisions not only are unnecessary to accomplish its intended purpose, but are likely to have serious unintended consequences. Far more public benefit will result from allowing agencies and Departments like Treasury continue to focus on and revise specific regulatory provisions that raise the problems sought to be addressed by H.R. 994.

This concludes my formal statement. I would be glad to answer any questions you may have on how H.R. 994 would affect the Department of the Treasury.

Mr. FOX. OK. All right, thank you very much, Mr. Knight. And I call now on Stephen Kaplan, General Counsel for the U.S. Department of Transportation.

STATEMENT OF STEPHEN KAPLAN, GENERAL COUNSEL, U.S. DEPARTMENT OF TRANSPORTATION

Mr. KAPLAN. Thank you, Mr. Chairman and members of the subcommittee. I am pleased to have the opportunity to present the Department's views on H.R. 994, and an area of great concern, obviously, to the administration, as well as to Congress, and that is, fundamentally improving the regulatory process. However, we find ourselves in the position of opposing H.R. 994 for five basic reasons.

First, H.R. 994 is basically not necessary. The Department of Transportation is now conducting, and has in the past conducted, its own regulatory review, and has, and continues to eliminate regulations which have outlived their usefulness, or amended those which needed to be updated.

Second, this legislation, as drafted, will greatly impair the ability of the department to protect the safety of the traveling public, which is, in the end, I think, our primary or certainly one of our primary responsibilities.

This may force the department to terminate existing safety regulations that we have already determined to be cost-beneficial, because we do economic analysis for each and every regulation. And we believe it may expose us to litigation because the language of the bill provides us with little discretion when crafting new regulations. And ironically, we believe it allows an executive branch agency to overcome the will of Congress by simply not reviewing statutorily mandated rules.

Third, the legislation places unrealistic and unreasonable demands on the department.

Fourth, in a futile effort to keep that from happening, the bill will prevent the Department from responding to new developments in transportation technology, because our staffs will have to be focused on prior regulations.

And fifth, the paperwork burden, about which this Congress has spoken so often, and in the legislation just signed by the President, will impose an enormous burden at great cost, with very little gain, in terms of commonsense regulation.

Safety is the No. 1 mission of the Department. And we have the safest transportation system in the world. We have partnerships with our industries, and partnerships with the public. If you look at the criteria, the 18 criteria, we believe you will create a situation in which legal chaos will result.

An example, the Department recently mandated antilock braking systems for trucks, tractor trailers and buses. This rule, which is expected to prevent about 29,000 crashes involving 500 deaths annually, will affect small companies in different ways from large companies. And generally speaking, a number of our most important rules have that effect.

And generally, we find—as we did, for example, with the commuter safety rules in the aviation industry—that a number of smaller companies view this rule economically differently, but

nonetheless supported it because they knew that enhancing consumer confidence in the safety of commuter aviation was critical to their survival.

We think that if you look through the regulations—ironically, one of which is, whether the regulation is crafted to minimize needless litigation—we believe that what in fact will happen is that every single one of these criteria will become new causes of action for the 30-day judicial review that is provided. We want to work with this committee and Congress to enhance both the safety of our transportation system, but also our regulatory process.

We do not want important rules to lapse, not because they are irrelevant, not because they are too expensive, not because they fail to save lives, not because we have carefully considered them and decided they were outdated, but simply because insufficient personnel and funds were available to conduct all of the reviews before this deadline passed. We don't believe this is an acceptable way to proceed, particularly in the safety area.

We have, as I mentioned, responded to our industries and the public on a regular basis. As you have heard others testify, we often have advisory committees. The FAA has the ARAC, which is an ongoing, standing committee to review rules, set regulatory priorities. We have industries that come to us because they want Federal preemption. They want the Federal Government to establish standards so that they are not burdening interstate commerce with 50 sets of rules and regulations.

So we do our best to respond. We look to performance standards. We want to be less prescriptive. We want to give the creative minds of the private sector the opportunity to meet our safety goals. But I ask you to remember that most of the safety regulations that we promulgate are done pursuant to congressional mandate. Thank you, Mr. Chairman, and I look forward to answering questions.

[The prepared statement of Mr. Kaplan follows:]

STATEMENT OF STEPHEN H. KAPLAN
GENERAL COUNSEL
U.S. DEPARTMENT OF TRANSPORTATION

BEFORE THE

SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH,
NATURAL RESOURCES AND REGULATORY AFFAIRS
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

May 2, 1995

Good afternoon, Mr. Chairman and Members of the Subcommittee. I am Stephen Kaplan, General Counsel of the U.S. Department of Transportation, and I am pleased to have the opportunity to present the Department's views on H.R. 994, the "Regulatory Sunset and Review Act of 1995." On March 28, 1995, Ms. Sally Katzen, Administrator of OMB's Office of Information and Regulatory Affairs, testified about this bill before this subcommittee. The Department agrees with her comments. While I will not take the time to repeat her testimony, I would like to provide you with the Department's perspective on how the provisions of this bill will prevent the Department from carrying out its most important mission -- protecting the safety of the traveling public.

H.R. 994 requires agencies to regularly review their regulations, and if any regulation is not reviewed in a timely manner, that regulation will be automatically terminated. The Department of Transportation opposes H.R. 994 for five reasons.

First, H.R. 994 is not necessary. The Department of Transportation is now conducting, and has in the past conducted, its own regulatory review, and has eliminated regulations which have outlived their usefulness. Second, this legislation as drafted will greatly impair the ability of the Department to protect the safety of the traveling public. The criteria this bill requires for review of regulations: (1) may force the Department to terminate existing safety regulations

that we have already determined to be cost-beneficial; and (2) possibly expose us to litigation because the language of the bill provides us with little discretion when crafting new regulations. Third, the legislation places unrealistic and unreasonable demands on the Department. The time constraints in this legislation will ensure that some rules will be terminated. Fourth, in a futile effort to keep that from happening, the bill will prevent the Department from responding to new developments in transportation technology, by having our staff review past regulations instead of focusing on new problems. Fifth, the paperwork burden this bill imposes on us comes at a great cost, with very little gain in terms of common-sense regulations.

Safety is the number one mission of the Department of Transportation. This country has the safest transportation system in the world, owing in no small part to the success that the Department has had in issuing common-sense regulations to ensure that personnel, technology, and operational practices in aviation, maritime, motor carrier, railroad and other transportation industries are as safe as practicable. Many of these regulations have been in place over a long period of time, and are well-integrated into the daily practices of transportation providers. We work every day to ensure these rules respond to new technology and changed conditions, and that they deal effectively with safety problems that arise.

Further, the Department has a long-standing commitment to regulatory reform and doing regulations the right way. As part of this commitment, we participate fully and effectively in efforts to review existing regulations. We reviewed our regulations as part of Administration initiatives during the Reagan and Bush Administrations. Now, we are enthusiastic participants in President Clinton's regulatory reform initiative. As part of this effort, we will produce, by

June 1, 1995, a list of DOT regulations that can be modified or eliminated as obsolete, unnecessary, or overly burdensome.

The Department, however, does not wait for Administration-wide initiatives to review its rules. Nor do we wait for Congress to act either. For example, the Federal Highway Administration (FHWA) is currently in the midst of a zero-based review of all its motor carrier safety regulations. This review, which started prior to November 1994, has already resulted in the rescission of a number of obsolete or unnecessary regulations.

H.R. 994, while mandating us to do something we already do, also requires us to do something in a way which we believe might impair our ability to ensure that the United States has the safest transportation system in the world. The bill states that when reviewing a regulation we must look at 18 different criteria to determine whether the rule should continue to exist. For example, the bill states that we must examine for every rule "the extent to which the regulation impedes competition." Under the "impedes competition" aspect of the bill, could the Department have issued our rule mandating antilock braking systems for trucks, tractor trailers and buses? This rule, which is expected to prevent about 29,000 crashes involving 500 deaths and 25,000 injuries annually, will affect small companies in a different way than it will affect larger companies; will this impede competition? Does that mean we should not have issued the rule? No, it does not. But would this bill have prevented us from doing so? Maybe. Among the bill's 18 criteria is one to determine whether the regulation "protects the health and safety of the public." H.R. 994 provides us with no guidance as to whether we should issue a rule which protects the safety of the public but at the cost of "impeding competition."

This is just one example of the possible detrimental consequences this legislation might have on the Department's safety mission. Our issuance last

March of the airline commuter safety proposal might also be affected by this legislation. Secretary Peña has made the strongest commitment to ensuring that there is "one level of safety" for airline passengers. The Secretary does not believe that a passenger on an MD-90 should have a safer flight than does a passenger on a Beech-1900. Would we have been able to issue the airline commuter safety proposal if H.R. 994 had been signed into law?

The provisions of H.R. 994 also do not necessarily allow us to balance what is in the public interest when crafting regulations. The bill requires us to issue a regulation which "maximizes the utility of market mechanisms to the extent feasible" and is "the most cost-efficient alternative." What happens if we determine that a regulation is necessary to protect the health and safety of the public but is not the most cost-efficient alternative, because a more cost-efficient alternative might save very few lives but at a lower cost per life saved? Should we issue the rule that saves the most lives in a cost-beneficial manner, or do we issue the rule that saves the most lives at the least cost? H.R. 994 not only provides us with no guidance on this subject, but it will leave the Department open to substantive challenges to our rules.

This legislation also places unrealistic and unreasonable demands on the Department. In prior administrations, the Federal Aviation Administration (FAA), over the years, has conducted many extensive reviews and revisions of major portions of its aviation safety rules. For example, one review covering aircraft certification rules, despite being designated a high priority, took approximately eight years. Under this bill, that would not have been good enough. Given this history, I question whether legislation mandating reviews is necessary: this Department, and Presidents of both parties, have a good record of reviewing existing regulations without it.

More important, the unreasonable schedules for the termination provisions will force agencies to spend most of their time looking backward. As a result, agencies will be unprepared to solve present safety problems and unable to look forward and effectively address future problems. The bill places a safety agency in an untenable position. Should the FAA use its staff and resources to review its existing pilot qualification rules or to respond to safety issues raised by new communications technology? Should NHTSA respond in a timely fashion to side-impact and other issues raised by the burgeoning popularity of minivans if, by so doing, it risks the elimination of its existing "air bag" rules? We cannot have it both ways. By creating these "either/or" choices, Congress guarantees that the safety of the American traveling public will be the loser.

Beyond this fundamental safety point, the Department objects to the overwhelming paperwork burden -- the 18-point reviews, the proposed and final reports to Congress on each regulation reviewed-- that this bill would place on agencies for very little gain in terms of common-sense regulation of transportation safety. This bill, of course, also applies to the regulations that facilitate the Department's very important task of assisting states and localities in building and maintaining a sound transportation infrastructure. Indiscriminate interference with the regulations that make infrastructure programs work effectively serves no one's interest.

The sunset provisions of the bill would also impose unreasonable burdens on industry and state and local governments, who would have to comply with safety, program, nondiscrimination and other statutory mandates without the legal and technical certainty our regulations provide.

The Department also objects to the judicial review provisions of the bill, which would make every aspect of its complicated review and report process subject to legal attack. It is one thing to make the substance of regulations subject

to court review, as the present Administrative Procedure Act quite properly does. It is another to multiply opportunities for legal challenges based on arcane points of procedure. It is ironic that, in a Congressional session that has devoted considerable attention to what some call "lawsuit abuse," H.R. 994 encourages litigation that allows special interests to harass and block the most important functions of this Department.

As Sally Katzen stated in her testimony, the Administration supports reasonable, systematic, and responsible regulatory review requirements. Unfortunately, H.R. 994 falls well short of this standard, and I cannot foresee circumstances in which the Department could support it. We are most willing to work with this Subcommittee, and with other Committees and Members, to develop sensible regulatory review legislation that will make the regulatory process, and the substance of our regulations, better.

Thank you, Mr. Chairman. I will be happy to answer your questions.

Nevertheless, when looking at a legislative proposal to require reviews of existing regulations, the Department must ask the same question it asks about all regulatory reform proposals: Would the proposal improve the situation, and provide more common sense in the regulatory process, so that we can do a better job? I'm afraid that for H.R. 994, the answer must be "no."

Given the complexity of transportation systems and technology, many DOT safety rules are necessarily lengthy and complex, and involve careful and detailed judgments balancing risks, costs, and benefits. They affect many different parties, such as transportation providers, equipment manufacturers, transportation employees, and consumers. As a result, reviewing transportation regulations is not something that can be done quickly or lightly, especially if we are to have full and effective public participation. Doing the job right is not compatible with meeting short, rigid, arbitrary deadlines.

Our DOT restructuring efforts are based on the maximum effective use of staff, not on the pointless review of rules that are already working well. The plain fact of the matter is that the Department does not have the staff, time or resources to review all its existing rules within 7 years. The sheer volume of DOT rules, and the length and complexity of the more significant safety rules, preclude our doing so. This is not an effective use of public resources.

Moreover, there are a great many DOT safety regulations. Many of them, individually, are "routine and frequent" rules. For example, Coast Guard rules that set opening times for drawbridges are "routine and frequent." Other such rules are the FAA rules regarding airspace actions that establish "rules of the road" around airports and other busy locations. In fact, DOT publishes in excess of 6,000 routine and frequent regulations each year. While these are not costly or, for the most part, controversial, they are vital to the everyday business of safe transportation.

Must these rules be reviewed under this bill? What would happen if the Department could not review all of its rules within 7 years? How would commuters like it if there were no rule in effect governing when the Woodrow Wilson Bridge opened for ship traffic? How would people who fly frequently in and out of Indianapolis like it if an FAA regulation governing use of the surrounding airspace suddenly lapsed? These rules generally do not have to be reviewed -- they are working.

Under the terms of this bill, some substantial number of DOT safety rules would go out of existence -- not because they are irrelevant, not because they are too expensive to implement, not because they fail to save lives, not because the reasons for them were not carefully considered after comments from the interested parties -- but simply because insufficient personnel and funds were available to conduct all of the reviews before an arbitrary deadline passed. This is not acceptable. The safety of the American traveling public is too important to be subordinated to the indiscriminate "sunset" requirement proposed by this bill.

The bill eliminates new rules -- those promulgated after the bill's enactment date -- after only three years. This even shorter review period has two drawbacks. First, it is not always possible to meaningfully review a rule after so short a period of time. Often, there will be a phase-in period that does not require full compliance for 1-5 years after promulgation. At least for many important and complex rules, data concerning the effectiveness and impacts of the rule are not available for analysis immediately after the effective date. Instead, it may take at least 3-5 additional years before sufficient data have been developed to enable us to make statistically significant findings. Second, because the Department will need to review newer rules immediately, it will make it that much more difficult to rationally schedule reviews of existing rules, compounding the number of rules which may then be terminated.

Mr. FOX. Thank you very much, Mr. Kaplan. At this time, we call on William E. Kennard, General Counsel to the U.S. Federal Communications Commission.

**STATEMENT OF WILLIAM E. KENNARD, GENERAL COUNSEL,
U.S. FEDERAL COMMUNICATIONS COMMISSION**

Mr. KENNARD. Thank you, Mr. Chairman, and that's pronounced Kennard.

Mr. FOX. Our apologies. Let the record reflect the correction, Kennard.

Mr. KENNARD. Thank you. Mr. Chairman, members of the subcommittee, I am very pleased to have the opportunity today to discuss H.R. 994 with you, the Regulatory Sunset and Review Act of 1995. We have submitted, also, a more extensive statement for the record, which sets forth in detail our critique of the bill, and how it would apply to the FCC. And I find that many of our comments are quite similar to the comments that I've heard from my colleagues here on the panel.

So I thought I'd focus, in my summary, on a little bit about what the FCC is doing, as a small, independent regulatory agency; and how, in particular, this proposed legislation would impact on our regulatory mission. The FCC has very significant regulatory responsibilities for what has become the fastest growing sector of our economy—the communications and information industries.

And our regulatory efforts are largely focused on implementing new communications technologies, helping to create new communications markets and promoting competition in those markets. Recently, for example, we developed rules for use of the airwaves to provide personal communication services, which we call PCS. PCS will facilitate much more cellular telephone service at much lower costs, and it will create a whole array of new wireless technologies, like wireless fax machines and wireless laptop computers and two-way paging devices.

We recently allocated licenses for direct satellite-to-home broadcasting, which will create a very exciting new industry for home viewers. We are also in the process of developing rules for satellite-to-home digital audio broadcasting. And we adopted rules recently which allowed us to hold the first ever public auctions of the airwaves. And thus far, our auctions have raised \$9 billion for the U.S. Treasury.

These are just a few of the actions that we're taking at the FCC to promote new markets, new industries, new economic growth, and ultimately, changing the way that Americans communicate with each other here and around the world. And in doing this, we have adopted many, many regulations; and we have also eliminated many, many regulations; and streamlined many, many regulations. We have to, because our regulations have to remain fluid, and they have to respond to new technology and new marketplace changes.

And our aim throughout has been to ensure that the regulations that we retain and the ones that—and the new ones that we enact, further the development of a procompetitive communications marketplace. My point here is that this effort must be careful and thoughtful and targeted and, above all, flexible. In that process, we

welcome congressional support and guidance. And we strongly support the goal of H.R. 994, which is to eliminate unnecessary regulation.

We believe, however, that the automatic sunset provisions of H.R. 994 do not offer the most effective way for the FCC to achieve the goal of regulatory reform. This bill's sunset provisions remind me of the routine purging of files in an overloaded computer data base. This is the device where, if your files get overloaded, a program automatically activates itself and it goes through and purges all your files.

Now, this mechanism creates valuable space in the system and keeps it from becoming slowed down by obsolete and unused files. And at first blush, this concept of automatic purging sounds appealing when applied to regulation. But there are very important differences. First, while the obligation of a user of a computer to periodically review his or her files is not particularly burdensome, the task of comprehensively reviewing and preparing detailed reports on the FCC's numerous regulatory programs and individual rules would be enormous.

We estimate that it would consume approximately 30 percent of the agency's policy and rulemaking staff, at an annual cost of some \$12 million. Second, while none of us likes to lose a computer file, the consequences of allowing an FCC regulation to lapse would be far more significant. And I don't think I need to go through the parade of horrors of what would happen if some of our important interference protection rules were somehow to disappear; it would be chaos.

Our experience at the FCC is that the industries that we regulate are certainly not shy about coming to us or coming to our congressional oversight committees and telling us when they think that there are regulations that are outmoded or overly burdensome. My point is simply, the targeted prioritized review and streamlining of regulation would be far more effective and efficient than the wholesale sunseting of all our regulations.

We, too, at the FCC have undertaken a comprehensive review of all our regulations. It was commenced last year under the leadership of FCC Chairman Reed Hunt. The results of that report, I've submitted for the record. And it's to point out that the process, as I've heard from some of the other witnesses here, is underway at the FCC. We've made considerable headway.

We believe that with the benefit of input from Congress, our staff expertise, the industries and others, we at the FCC can and will remain committed to continuing the process of eliminating those regulations that are unnecessary and streamlining those that are burdensome. Thank you.

[The prepared statement of Mr. Kennard follows:]

Testimony of William E. Kennard

General Counsel

Federal Communications Commission

on

H.R. 994

Regulatory Sunset and Review Act of 1995

before the

U.S. House of Representatives

Committee on Government Reform and Oversight

**Subcommittee on National Economic Growth, Natural Resources,
and Regulatory Affairs**

Tuesday, May 2, 1995

2154 Rayburn

2:00 pm

Mr. Chairman and members of the Subcommittee, thank you for inviting me to share my views on H.R. 994, the Regulatory Sunset and Review Act of 1995. This bill attempts to relieve the burden and expense imposed on American citizens and businesses by unnecessary and overly restrictive government regulation. The bill would require all agencies comprehensively to review their regulatory programs in an effort to eliminate regulations that are obsolete, inconsistent, duplicative or impede competition. The bill details 18 specific criteria for review to be used by agencies in performing such an analysis. Unless an agency makes a deliberate decision to extend a regulation in accordance with these criteria and the detailed review and reporting requirements outlined in the bill, the regulation would be automatically terminated.

The FCC plays a number of important roles in the American economy. Our regulatory efforts are focused largely on creating new communications markets and ensuring that such markets are competitive. Some examples of recent FCC rulemaking actions that further these goals include:

- We developed rules for the use of spectrum to provide personal communications services, a new competitor to cellular radio.
- We adopted rules that enabled us to launch the first-ever auctions of the public airwaves, implementing the first market-based system for allocating valuable FCC licenses. High bids in the four auctions we have held to date total nearly \$9 billion.
- We moved, and are continuing to move, to establish fair rules for telephone company entry into the video business so that competition to cable will develop and cable rates can ultimately be

deregulated.

- We introduced increased local telephone competition by setting rules for expanded interconnection to the telephone network by competitive access providers.
- We generated a wave of potential competition to cable television by devising new procedures to expedite wireless cable licenses. We eliminated burdensome paperwork, accelerated engineering processing, and have proposed to use auctions to resolve mutually exclusive applications.
- We have initiated electronic filing for certain licenses. As an example of the time savings achieved through that measure, amateur radio licenses, which used to take 60 days to grant, are now granted in three days.
- We have issued a proposed rule to allow personal computer manufacturers to self-certify their compliance with our radio interference standards. The industry estimates that this action will save it about \$250 million annually; it will reduce our equipment authorization applications by more than 50% and, for the remaining applications, we plan to introduce electronic filing.

The FCC strongly supports H.R. 994's goal of eliminating unnecessary regulation. In recent years, the FCC has been committed to regular review of its regulations. We have eliminated numerous regulations and streamlined many others. And we have sought to ensure that those regulations that we keep, and new ones that we enact, further the development of pro-competitive markets and new services to the benefit of American consumers.

We have undertaken this effort in a careful and thoughtful manner. We believe we have been extremely successful. Among the regulatory programs that the FCC has recently reviewed comprehensively, or is in the process of reviewing comprehensively, are the following: (1) the Part 22 rules governing cellular radio and other public mobile

radio services; (2) the Part 90 rules governing private mobile radio services; (3) the price caps rules governing rate regulation of AT&T and the local exchange carriers; (4) the broadcast multiple ownership rules and the related ownership attribution rules; (5) the criteria used for comparative hearings among competing applicants for new broadcast stations; (6) the ex parte rules; (7) the Part 17 tower lighting and marking rules; (8) the Part 25 satellite rules; and (9) the Part 65 rate of return prescription rules.

The FCC has used sunset mechanisms where appropriate. For example, we adopted an automatic sunset of certain remaining rules governing financial interests and syndication rights of television stations in television programming and recently proposed a sunset of certain proposed children's television rules. For the FCC, with its numerous pro-competitive and new service rules, we believe targeted sunsets are a better approach than across-the-board sunsets.

While our efforts to date have been extremely successful, we recognize that there is more to do. For this reason, last year FCC Chairman Reed E. Hundt asked his Special Counsel for Reinventing Government, in cooperation with agency staff, industry and the public, to study the agency and every aspect of its mission to determine how the FCC could work better and cost less. In February, after a year of concentrated effort, the special counsel released a Report entitled, "Creating a Federal Communications Commission for the Information Age," which compiled a list of proposed actions to eliminate or streamline FCC regulations. Many of these actions are now underway. (See Appendix B of the Report, which I am submitting for the

record). Similarly, the Report outlines 35 legislative proposals that will form the basis of a submission to Congress aimed at reducing regulatory burdens on industry and streamlining the FCC's processes. (See Appendix A of the Report.)

We remain committed to these deregulatory and pro-competitive efforts and welcome congressional support and guidance. Nevertheless, we believe that the sunset provisions of H.R. 994 do not offer the most effective way for the FCC to achieve our shared goal of regulatory reform.

The bill's sunset device reminds me of the routine purging of files on an overloaded computer network--if a computer user does not specifically act to save a file, the file is purged by default. This mechanism creates valuable space in the system and keeps it from becoming slowed down by extraneous, obsolete and unused files. And the obligation on each user periodically to review his or her files is not particularly burdensome. At first blush, this concept of automatic termination absent an intentional decision to save sounds just as appealing in the context of rules as in the context of computer space. But there are important differences that I believe make this approach much less effective, and create other serious problems, in the FCC regulatory context.

Many of the differences between the computer and the FCC regulatory contexts relate to the enormity of the task involved in the continuous, comprehensive regulatory review contemplated by H.R. 994. Even small agencies like the FCC have, depending on the definitions one uses, dozens or hundreds of regulatory programs, and thousands of individual rules. The FCC has roughly 5,000 individually codified

regulations organized into broad rule categories in the CFR. Reviewing them all over a seven-year period would mean reviewing, and preparing detailed reports on, roughly 700 separate regulations a year. Conducting this review and preparing the required reports in a manner sufficient to satisfy exacting congressional and judicial scrutiny would obviously be a huge task for a small agency like the FCC. We believe continuation of the more targeted approach already being used by the FCC would ultimately result in more effective results at the FCC.

One effect of this enormous burden on FCC resources is that it would stymie the FCC's important mission of encouraging economic growth through vigorously promoting competition in all communications markets and providing opportunities for the rapid development and delivery of advanced communications services to all Americans. The FCC adopts in the range of 100-300 rulemaking decisions a year, each of them often encompassing numerous specific rules. As noted previously, in recent years, many of these actions have been aimed at eliminating or streamlining regulations where such effort is most needed and developing regulations to promote competition and new services, such as advanced wireless communications services and additional broadcast service to local communities all over the country. Resources to continue these efforts would have to be diverted to the comprehensive, continuous, and paperwork-intensive review of all previously and newly promulgated regulations. Indeed, the ability of the agency to promptly and carefully take the pro-competitive actions contemplated by pending telecommunications reform legislation would, ironically, be hampered by the diversion of resources to review and prepare reports on

every single agency rule. In addition, a major challenge facing the agency is reducing the time it takes to obtain FCC approval, as required by statute, for relatively routine applications. Diversion to the regulatory review process of already scarce processing resources will only make this task more difficult.

There is another important difference between the computer and the FCC regulatory contexts. While no one likes to lose a computer file, the consequences of making a mistake and unintentionally allowing an FCC regulation to lapse can be far more significant. Many FCC regulations implement statutory requirements; if these rules lapsed unintentionally, the FCC would be violating the law. Many other FCC regulations provide guidance to industry on compliance with statutory requirements. Without such rules, industry would run the risk of adverse decisions in an adjudicatory context without any advance guidance, at a potential cost of millions of dollars.

Because many FCC regulations promote competition, their unintentional elimination could lead to monopolistic abuses. Many FCC rules also allow for the provision of new and innovative communications services, or flexibility in the provision of existing services. Without these rules, consumers would receive fewer services and business would have less flexibility. In addition, particularly with respect to rules governing new services and new competition, reasonable stability and predictability is often important for industry to attract the necessary investment capital for start-up and initial service. The uncertainty added by the sunset provision is likely to add a disruptive factor to the development of new and competitive communications markets.

Other FCC rules allocate broadcast frequencies to individual communities

across the country; unintentional termination of such rules could threaten broadcast service to these local communities. As a final example, one of the FCC's key roles is developing and enforcing rules to prevent interference. Unintentional elimination of such rules could not only cause harmful interference to numerous important communications services, but could cause serious harm to public safety, for example, in the case of interference to aeronautical frequencies.

H.R. 994 would also dramatically alter the role of the federal courts in reviewing agency action. Under the proposed legislation, the FCC's application of the 18 articulated standards in its decision to extend, terminate, modify or consolidate a specific rule would be subject to judicial review. Because judges would have to test the FCC's decision against these 18 factors-- many of them subjective-- the bill as drafted would necessarily inject judges into the business of making communications policy.

To sum up, FCC rules that work should not be placed in jeopardy of automatic termination. Many FCC rules work, and new or modified rules can make our existing rules work even better. We believe that, for the FCC, the goal of H.R. 994 -- true regulatory reform -- can best be reached through reasoned and responsible FCC review of specifically targeted regulations. Indeed, we at the FCC, with the benefit of input from Congress, our staff expertise, the communications industry, and others, remain committed to continuing the process of eliminating those regulations that are unnecessary and streamlining those that are burdensome. By focusing our efforts primarily on these regulations, we can move swiftly to review, terminate or modify

them as warranted, in a manner that maximizes the use of scarce FCC resources, and does not inappropriately shift responsibility over the development of communications policy to the Federal courts.

Thank you. I would be happy to answer any questions.

**RESPONSE TO QUESTIONS ON H.R. 994 IN LETTER DATED MARCH 29, 1995
FROM CONGRESSWOMAN CARDISS COLLINS, RANKING MEMBER,
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT, TO REED E.
HUNDT, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION**

1. How many regulations are currently administered by your agency?

The FCC's regulations are found at Title 47 of the Code of Federal Regulations (CFR). The Title contains 40 rule parts, including, for example, those implementing Radio Broadcast Service in Part 73, Cellular Radio and other public mobile services in Part 22, Personal Communications Services in Part 24, and Satellite Communications in Part 25. Taken together, these 40 rule parts include approximately 5,000 individual regulations.

2. How many final regulations have been issued by your agency in each of the years 1981-1994?

The totals listed below include the approximate number of rulemaking Report and Orders issued for each year (including amendments to the Broadcast Table of Allotments in Part 73). Most of those orders (other than the broadcast allotment orders) include multiple specific rules.

1981-250
1982-250
1983-251
1984-253
1985-250
1986-216
1987-370
1988-374
1989-337
1990-359
1991-370
1992-292
1993-234
1994-139

3. For those final rules issued by your agency in each of the years 1981-1994, how many rules: establish new regulatory requirements; implement revisions to existing regulatory requirements; and eliminate regulatory requirements?

The FCC's rulemaking orders often address numerous rules. It would not be possible to make an accurate allocation based on these categories without going through and reading all the Report and Orders listed above and making an allocation for each Report and Order.

4. How many existing regulations has your agency reviewed to determine whether they continue to serve the purpose for which they were originally issued in each of the years 1981-1994?

The FCC, with the benefit of Congressional oversight, our staff expertise, and the input of the communications industry and others, regularly reviews, modifies, revises and streamlines its regulations to ensure that they continue to serve a necessary and useful purpose. In addition, since 1981, pursuant to the Regulatory Flexibility Act of 1980, we have performed a periodic review of all rules issued under notice and comment rulemaking to determine whether such rules should be continued without change, or should be amended or rescinded, to minimize any significant economic impact of the rules upon a substantial number of small entities.

5. How many regulations would your agency have to review within the three-year period and within the seven-year time period established by H.R. 994?

Within the seven-year period, FCC staff would have to review all of the 40 rule parts within Title 47 of the CFR or approximately 5,000 regulations. This does not include review of new rules issued during the review period, policy statements and uncodified regulatory programs such as Open Network Architecture orders requiring local exchange carriers to open up their networks for use by competing enhanced service providers.

6. How many people would your agency envision needing in order to carry out the requirements of H.R. 994 to review all existing and all new regulations that are issued?

Although this is very difficult to calculate, in addition to the Regulatory Review Officer mandated by the bill, and assuming that the FCC must review its 40 CFR rule parts within 7 years, nearly 6 per year, we estimate that we would need approximately 20 FTEs per rule part, or 120 FTEs per year to review the FCC's existing rules for purposes of H.R. 994. This estimate represents nearly 30% of the FCC FTEs devoted to policy and rulemaking activities. This estimate does not include the review of new rules issued during the review period, policy statements or uncodified regulatory programs.

7. What are the administrative costs your agency would expect to incur in order to carry out the review and other requirements of H.R. 994?

Using an average professional FTE salary, benefit and overhead cost of approximately \$100,000, the administrative cost associated with the required review would be approximately \$12 million annually. This estimate does not include the review of new rules issued during the review period, policy statements or uncodified regulatory programs.

Mr. FOX. Thank you, Mr. Kennard, for your testimony. I appreciate the correction for the record, as well.

Mr. KENNARD. Thank you, Mr. Chairman.

Mr. FOX. I will say, at this time, first, I want to thank all the witnesses for their testimony, initially. They were very informative and very persuasive. I will say this, that all written statements that will be given to us, or have been given to us, will be included in the record. And for my colleagues who did not have the opportunity at the outset to make an opening statement, are there any that would like to make a statement at this time, before we go into questions?

Mr. WAXMAN. Mr. Chairman, may I ask unanimous consent that all members have the right to submit an opening statement for the record?

Mr. FOX. So ordered. At this time, I would start the questioning myself, and then make sure we go on a revolving basis so that everyone has the chance to ask some questions. I would first ask a question to Mr. Richard Roberts, if I may, the Commissioner of SEC.

Your testimony seemed to suggest to me that a regulation that is only 7 years old, which is proposed under the legislation, would not necessarily be ripe for a review. What do you think the average life span for an SEC regulation for review might be?

Mr. ROBERTS. It would be hard to say. Of course, any time period is somewhat arbitrary. Some, I suppose, could be justified more than others. It depends on the—it does depend on the rule. I think taking—drawing upon what Mr. Kennard just said, whatever regulatory sunset and review act is pursued does need to be careful and flexible. We need flexibility. And depending on the magnitude of the rule, the time period could vary. I don't know that there is any one magic number.

Mr. FOX. OK. I now open the questions to other colleagues. Congressman Waxman.

Mr. WAXMAN. Thank you, Mr. Chairman. I want to focus my initial questions on the ramifications of the sunset requirement. It's a fact of life that agencies make mistakes and sometimes miss deadlines. In fact, in my experience, deadlines are more often missed than met. I want to know what the ramifications will be if the agency doesn't review a regulation within the 7-year deadline in H.R. 994, and the regulation then just sunsets.

Mr. Knight, you've said that the sunset provision could produce a gap in money laundering regulations, through which drug dealers and terrorists could move funds with no fear of detection. How would that be true?

Mr. KNIGHT. Well, in the recent months, we have revised our regulations in that area to make them more responsive to the modern financial system that we currently have. We've updated forms. We've reached out to the financial community, so that we feel now, the regulations are well-suited to the type of financial system that we have now.

If those regulations—which, again, I'd like to emphasize, were developed in concert with the industry, through advisory commissions that were set up by the Treasury Department—if those were terminated because of some regulatory accident in complying with

this legislation, we would go back to a system which was unworkable and was suited for a different time in our economic history.

We have had to adjust our regulations in this area to the developments in the financial community. And so we would be left with an outmoded system.

Mr. WAXMAN. So would we be talking about money laundering regulations and regulations that would affect drug dealers and terrorists?

Mr. KNIGHT. Because of course, the instrument through which drug dealers launder their money is our financial institutions. And we have regulations designed to detect that, to be used in concert with other law enforcement agencies to—

Mr. WAXMAN. Those regulations would expire?

Mr. KNIGHT. They could expire.

Mr. WAXMAN. Now, let me ask you this—could the sunset provisions impair the liquidity of the government securities market, and force the Federal Government to pay higher interest rates?

Mr. KNIGHT. Well, the Bureau of Public Debt issues the terms and conditions of the debt instruments which the United States issues to fund its debt. Those terms and conditions are regulations.

Mr. WAXMAN. So they can sunset if nothing happens, if you miss a deadline.

Mr. KNIGHT. They could also sunset. If, again, out of some regulatory accident, some judicial determination in interpreting the 18 standards that have to be applied in reviewing these regulations, could create a missed deadline that would, in turn, have implications to our markets. And they would not have the certainty they need, in terms of the conditions that would apply to those financial instruments that are the underpinning of our financial system.

Mr. WAXMAN. Thank you. Ms. Feder, you've stated in your written testimony that H.R. 994 could jeopardize the health of Medicare and Medicaid clients. Could you just briefly answer why that might happen?

Ms. FEDER. Yes, Mr. Waxman. As you know, a large part of our regulatory effort involves the specification of what we cover, the terms on which we pay, conditions of participation for providers in the program. All of those are implemented through regulation. And if they lapsed for the same reasons that have been laid out, the access of beneficiaries to care, and our capacity to pay for that care, would be jeopardized.

Mr. WAXMAN. And would our efforts to stop fraud and abuse in the programs possibly be set back if our regulations against fraud expired?

Ms. FEDER. Absolutely. Not only would we be not able to—be hampered in our activities, our ability to go after fraud, but many of our regulations identify safe harbors for doctors and institutions that are attempting to operate in ways that are not fraudulent. Those safe harbors are specified in regulations. And should they expire, again, through nobody's particular fault, the providers in the Nation would also be at risk.

Mr. WAXMAN. Thank you. Mr. Gilliland, under the Federal Food and Drug Act, it's illegal to use pesticides on food crops unless EPA has established a tolerance for the pesticide by regulation. This is a very time-consuming process, involving difficult scientific ques-

tions. If EPA failed to review its tolerance regulations on time and these tolerances sunsetted, it would be illegal for farmers to use pesticides.

Is this an accurate statement? And would we have an unfair punishment of farmers, by taking away their ability to use a pesticide, just because EPA missed a deadline?

Mr. GILLILAND. Well, Congressman Waxman, that's an accurate statement. I shudder to think what the consequences would be, which would be beyond my ability to articulate them. I think that not only would the consequences be significant in that particular instance, but there's perception in the groups with whom we deal that they look for a better standard of safety and security.

And that's the reason, for example, why, in our food safety area, it's the industry that comes to us for the certainty in the labeling and in their procedures.

Mr. WAXMAN. If I could interrupt you, because I see the yellow light, and my time is about to expire. So we're jeopardizing possible food safety and the public health in having these sunsets. Another serious problem is that rather than have a statutory standard for regulations under existing law, there would be 18 new review criteria, including whether the regulation impedes competition, passes cost benefit analysis, is cost-efficient, and maximizes market mechanisms.

It's a one-size-fits-all approach that this bill mandates. I'd like to ask, for the record, Mr. Chairman, if each of you in your respective agencies could comment on whether you think these review requirements are appropriate criteria for your agency; and to be specific in discussing the review criteria and how it would apply to specific regulations.

And I'd like to ask you to further review your regulatory programs individually, and state whether the review requirements in H.R. 994, and those in H.R. 9, which has been suggested as an alternative, would be consistent with these programs, or would conflict with them. And I would appreciate it—because we're being told this bill may be marked up within a week—if you could give us, in writing, a response to this, so that we can raise these issues, should there be a mark-up prior to the members of the committee having all the information. Thank you, Mr. Chairman.

Mr. FOX. I understand the request from Mr. Waxman is consistent with the committee's goals, and we appreciate your assistance in trying to answer those questions either today or with submitted written testimony at your—within due course. Within a week, if possible, please. And now I'll go on to the gentlelady from New York, Congresswoman Slaughter.

Ms. SLAUGHTER. Thank you, Mr. Chairman, I appreciate it. Dr. Feder, gentlemen, it's awfully good to see you here, and I am pleased to have your statements on the record. There are a number of things that I want to dwell on. As I look through some of your statements, almost every one of you has commented in one way or another that in order to comply, you would have to greatly increase your staff.

And particularly, to Mr. Kennard, as I understand it, you would need \$12 million more annually to hire additional staff; that you would need 120 full-time staff equivalents in order just to comply

with this. Obviously, I know you and I both know you're not going to get \$12 million more. So what I would like to know is, what will the FCC not be able to do, if it had to perform these reviews that are required in this legislation? What would the effect be on communication firms in the U.S. telecommunications market?

Mr. KENNARD. Well, \$12 million to the FCC, which is a small agency, is a lot of money. And it would severely impact on our ability to devote our rulemaking resources to other areas. We are an agency where, ironically, many industries come to us and want us to promulgate new regulations, because we need regulations to govern new technologies and to help create new markets.

And it's vitally important to those industries, the economy, and American consumers that we have the resources to write the rules of competition for these new industries. I fear that if we did not have the resources to do that, it would have tremendously adverse consequences.

Ms. SLAUGHTER. Mr. Knight, you mentioned, too, and I wish you'd elaborate on it, and I'd like to have more time for you. But the taxpayers assistance that you do—in the last 3 years, you've had over 7,000 private letter rulings in the technical advice memoranda. Obviously, if you have to go through all that termination, the IRS private letter rulings, revenue rulings, revenue procedures will all be subject to review and termination.

Mr. KNIGHT. Yes.

Ms. SLAUGHTER. Does that make any sense to you, to do that?

Mr. KNIGHT. Well, I can understand the public frustration with our tax system. To blame it on the regulations, I think, is misplaced. We have an Internal Revenue Code that is, as I mentioned, over 7,000 pages long. It is a reflection of a very complex economy and a very complex global economy. And in an effort to be fair to taxpayers, the tax system reflects that complexity.

But that doesn't mean that the Code is not vague in places, or highly technical in places. And in those places, the public ask for guidance. The guidance is in the form of revenue rulings, private letter rulings, regulations, closing agreements. These are, in most cases, informational type of regulations, which the public wants.

The Tax Executives Institute, the New York State Bar Association, many organizations have written Congress to explain that their view of tax regulations is that it makes a very complex tax code understandable, and it's something they need. That doesn't mean the tax code is perfect. It doesn't mean we couldn't do a better job; and we're trying to. But to take this one-size-fits-all approach to the tax regulatory process, I think, is inappropriate.

It will leave taxpayers without the guidance they need. It could harm our revenue collection process, and I don't think it's what the public really needs in this instance.

Ms. SLAUGHTER. Mr. Roberts, one of the things that we've been concerned about is, how the SEC—you've already allocated your resources pretty effectively. And it's particularly significant, I think, in light of the fact that the two effective review and rewrite regulations may require months or years of work to do. Since this procedure has resulted in 400 reviews since 1980—that's about 28 a year, I think, if I'm correct—you say that the H.R. 994 would require the SEC to review about 250 rules a year?

Mr. ROBERTS. That's our estimation.

Ms. SLAUGHTER. If you had to do that, what would you have to give up doing?

Mr. ROBERTS. Well, of course, we have a relatively small agency—roughly 2,800 employees. We've estimated that approximately 40 spend the majority of their time writing rules. Obviously, it would probably take much more than 40 to review thoroughly and extensively 250 rules a year. So you're looking at taking away other services that the agency provides.

We're talking about inspection activities, enforcement activities, processing filings that enable transactions to move forward, clearing disclosure documents and the like, market oversight, as well as other services. And certainly any effort of that magnitude would require the redeployment of significant resources. It would pose a problem for the agency's operations, and to the workings of the securities markets in general, in my opinion.

Ms. SLAUGHTER. I was going to ask you what effect you thought that would have on the investment community.

Mr. ROBERTS. Well, an adverse impact. It would mean that transactions could mean—may move slower, be closed in a slower, more ponderous fashion. It would mean that enforcement cases that need to be brought or need to be investigated to root out bad practices in our securities markets—and there are a few—that they would be slower, and we would be less likely to respond to those.

Ms. SLAUGHTER. I see my time is up, but I would like it if we could get some more information from Department of Agriculture on public health and safety, and how it would be jeopardized. I'm not going to have time, sir, but if you would give us a report on that, I would be very grateful. Thank you.

Mr. GILLILAND. Will do.

Mr. FOX. Thank you, Congresswoman Slaughter. Congressman Kanjorski.

Mr. KANJORSKI. Thank you very much, Mr. Chairman. Listening to testimony of the panel, I come to the conclusion that you're almost defenders of the status quo. And although I know the administration, over the last 2 years, has endeavored to update certain things and be more user friendly, the final tone that I seem to get is that I'm not sure that the panel and the administration, or the executive branch, is looking at the frustration of what brings about this type of legislation.

And the frustration, if I could spell it out—maybe I'm going to be a little bit of a contrary on the Democratic side. There are millions and millions of average Americans, millions of small business people, that totally feel overwhelmed in dealing with the Federal Government. They identify your agencies and departments and many others, that you do deal with industries and associations and groups, and that there's a clique in this society of ours that the government works with them that have.

And the average American and the average businessman has a wall that keeps him out of dealing with the Federal Government or engaging in business activity. And every now and then, maybe 1 out of 10 or 1 out of 100 average Americans or average businesspeople, run up against a rule or regulation that says you can't get there from here. I was just listening to every one of you

in terms of my congressional district, or complaints that I have had.

And every one of the departments here and agencies here, I've heard of, no damn rule could be that unreasonable or stupid as applied. And that's what we're getting, representing average people out there. I'll give an example of HHS so that—a cancer patient that, in order to save money and get chemotherapy, stayed home rather than going to the hospital. As a result, found out months later, thousands of dollars for chemotherapy would have been paid if they'd spent three or four times as much by going to the hospital. But being the sensible thing and staying home, getting the service, they were denied any payment.

There's nobody who can overcome that regulation. There's nobody that has the nerve or the foresight to use managerial skill. They seem to be soldiers out in the field that say, it's here in black and white and even though it's stupid and even though it doesn't look like it's credible or has any thought process behind it, that's the law; that's the rule; that's the regulation; that's what we follow. And that's what's setting off average Americans against this Government.

I think to take this position here that the status quo is OK or you're working with it, I think, I hope that isn't the position of this administration. Because if it is, you're not reading why this bill was written, why it appeals to so many Americans, and that this may be only the beginning of what's going to happen to disassemble this government. I'm just thinking of the IRS and the defense of 7,000 pages of law.

I mean, that's incredible. I think you ought to be coming up here and telling us what we can do to make a user-friendly government. Why are you all sitting downtown and saying, this is what we want; this is what we understand; this is what we do, we review and all this, instead of saying, this is ridiculous. What average American do you know that can really do his own income tax? Because my constituents go to three or four IRS offices and they get a different bill.

Not even their own people can interpret what the rules and regulations in the law is.

Mr. KNIGHT. Congressman?

Mr. KANJORSKI. Yes.

Mr. KNIGHT. You raise the IRS. Again, I'm not defending the Code. The Code is something we have to implement that—

Mr. KANJORSKI. No, no, but you have the obligation, Mr. Knight, to come up here and tell us if the Code is no damn good and let's change it, instead of let's waiting around until we have fools make a flat tax. Because the people are so frustrated out there, they're going to do anything to change the circumstances. There's got to be a middle ground of reasonableness. And I just don't think it's fair for you to come up here and say—I think this is garbage, this piece of legislation.

I think this will destroy the Federal Government and how it operates fairly. But I don't hear a reasonable alternative put forth as to what we really should do. And quite frankly, I've never worked in a Federal agency, and some of the experiences I've had in the two past administrations and some in this administration, I'm not

so sure too many people have been working there too long. And sometimes it's the lawyers.

They have wonderful reasons in our society why you can't get there from here. And what the American people and the average people are asking for is, you better make your government friendly, or we're not going to participate with that type of government. And to an extent, I think that's the anxiety that's out there in Middle America today. And if we don't answer, if you fellows didn't come out here—I mean, I'm just thinking, listening to you, Mr. Kaplan, hell, they're about ready to do away with Transportation.

I mean, obviously, your regulations are so good and so fair, why is everybody, or a majority of the Congress, thinking about doing away with you? And they will, if we don't find some user-friendly way of doing it; convincing the American people it's been done; and then having them personally experience that it's been done. Instead, the only people that are getting fair representation in this society today are the very large corporations, the very wealthy people that have the consultants, the Washington and the New York and the Philadelphia lawyers who can deal on an agency basis.

The rest of the American people feel it's dangerous to go in, it's dangerous to talk to them. I don't care whether it's a farmer in Pennsylvania or whether it's a communicator in Pennsylvania. I don't care whether it's somebody dealing with a hospital system or a health care system. They have the same impressions. And I'm just telling you from a position from a Democratic Member of Congress—if you all don't tell us how to change it, it's going to be changed.

But you're going to get garbage like this passed. I don't think it's good enough for you to come up here and tell us why this won't work. I think you've got to come up here and tell us what we have to do to make a more user-friendly government and a fairer government. And I don't think it's—it certainly isn't the opinion of the American people that we've done that. And I've used up all my time, Mr. Chairman, and I don't suspect there is any answer to the question I would have posed. Thank you.

Mr. FOX. I thank you, Congressman Kanjorski. Congressman Spratt.

Mr. SPRATT. Thank you very much, Mr. Chairman. Let me just ask you to walk with us through the proposed legislation, and get your interpretation of how we should interpret it. It clearly provides that if the agency head has not taken all of the necessary steps prior to the termination date, then the regulations expire by virtue of this bill.

What happens if there is a pending court action? What happens if some litigant withstanding challenges the adequacy of agency review? Now, I suppose the court could extend the date, but is there any provision here for handling that interim period, during which the court is sitting in review, after you pass the termination date? What do we have then? Is this a period of limbo?

Mr. KAPLAN. Congressman, I'll take a shot at that. If it's at the end of the time period, the regulation is gone, unless it's extended by the court.

Mr. SPRATT. But is there authority for the court to extend it, under this bill?

Mr. KAPLAN. No, but—

Mr. SPRATT. You would assume that.

Mr. KAPLAN [continuing]. Not expressly.

Mr. SPRATT. So it's unclear as to whether or not—you know the litigation. This is a fairly compressed time period here for agency review. And you know any litigation that's broad is going to extend beyond this time period, and probably beyond the potential termination date. So you've got a limbo period where you don't know whether or not the regulations are still in effect.

No. 1, to this litigant. What about to litigants that didn't elect—or potential litigants that didn't elect to bring a suit. Would it apply to them or not? Do you know? Can you tell from reading the bill? Now, let's assume it does terminate, and the court later finds that—eventually finds, once it's winded its way to the Supreme Court—that a particular problem existed out of the 18 criteria, criteria No. 16 was insufficiently reviewed.

And corrective action is easy enough to be obtained. Then what? As you read the bill, must the agency follow the administrative procedure act and repromulgate these regulations, put them out for comment, go through the whole process again? Or are they reinstated automatically, once this particular deficiency is corrected?

Mr. ROBERTS. Congressman Spratt, there are a number of unanswered questions in my mind regarding the litigation aspects and how it weaves in to the timetables expressed in the legislation. And I don't know.

Mr. SPRATT. All right. And you raise some good ones in your testimony. I think it would behoove you to come up with practical instances like this, otherwise, if this becomes law, we'll be left to the courts. And that's not the place, that's not, as a matter of legal process, where issues like that should be resolved. If we're going to have a law like this, let's iron these issues out.

Even if the regulations are terminated for whatever reason, we still have underlying law. Let's assume the agency goes through this process and can't satisfy all 18 criteria, and so they terminate. Or let's assume a court says the agency has not satisfied its obligation. You've still got an underlying statute. Then what? What force of validity does it have?

Mr. KENNARD. Well, Congressman, in that case—and I'll speak for our authorizing statute—we have our essential mandate that is quite simple: to serve the public interest, convenience and necessity. And we have many regulations that kind of put flesh on that very simple mandate. While the underlying law would remain in effect, if the implementing regulations had terminated, the industry and consumers would have very little guidance as to what that public interest standard means in a particular context.

So it could be—depending on the context, it could be a very difficult situation.

Mr. SPRATT. But it would still be on the books. The law would still be on the books. There's no repealer here; this is only a termination.

Mr. KENNARD. The statute would be on the books, yes.

Mr. SPRATT. So anyone who wanted to delve into that realm of transportation or securities would have a black letter statutory law, but no regulatory guidelines to follow.

Mr. KENNARD. Correct.

Mr. SPRATT. Thank you very much.

Mr. FOX. Thank you, Congressman Spratt. I now call on Congressman Gutknecht of Minnesota.

Mr. GUTKNECHT. Thank you, Mr. Chairman. I almost feel like I should yield some additional time to Mr. Kanjorski. I didn't agree with all of his conclusions, but I certainly agreed with most of his postulates. We had field hearings around Indiana, and I had a number of town meetings in my own district, during the district work period.

And in fact, at the end of—at several of my town meetings, I would start by introducing myself and saying that I'm from the Federal Government and I'm here to help you. And it was amazing—everyone laughed. And I think that's sort of indicative of how people generally feel about the Federal Government today. Now, this legislation may not be perfect, but we would welcome your advice and help in trying to make it better.

Because I think Mr. Kanjorski said really what's on the American people's mind. And that is, if you can't fix it, then tear it down and start with a blank sheet of paper. Many corporations, over the last—in fact, virtually every business that I've talked to over the last 10 years has gone through a painful period of restructuring. And they've all started with the basic assumption that we're there to serve the customer.

And I'm not certain—and we hear those words, sometimes, coming from government agencies. But the bottom line, and, I think, the truth, is that that's not the way the government really works. At least, that's not the attitude that's expressed most of the time. And I'm not faulting Federal employees. I think all of you here are good people. I think you want to do the right thing. I think most Federal employees want to do the right thing.

But the bureaucratic system that we've created seems to tug in the other direction. And the rulemaking process and all the rules we've created, seem to pull everybody and everything in the wrong direction. And I didn't catch all of your testimony. The little bit that I did hear, though, was sort of just reinforced the notion that everything is OK. And I'm not sure that's what you meant to say, but I think that's the attitude that's left.

And we need some—and perhaps I should just let you respond to some of the points that Mr. Kanjorski said. And I'm essentially saying the same thing—the status quo doesn't live here anymore. It's no longer acceptable to just say, well, that's the way it is. And in fact, the meeting we had earlier today, I think—referring to correction day—was largely a reaction to this basic notion that for too long, the tail has sort of wagged the dog around here.

And I think the American people sort of sense that; that their Congressmen would come home for town meetings and they would complain about things and he'd say, well, that's the bureaucracy for you. And then when they'd talk to the agencies, the agency would say, well, that's the way the law was written; we don't have any choice. And that is the most frustrating thing of all for an American to hear from anybody.

I mean, Americans are used to having answers. I'm sorry, I'm talking longer than I expected to. But can you respond to some of this? I mean, is the status quo acceptable to you?

Ms. FEDER. Mr. Gutknecht, I'd like to start, if I may. We have not been satisfied with the status quo, either, in the administration, or specifically, in the Department of Health and Human Services. And I know, in my written testimony, and I believe in the testimony of my colleagues, we have talked about the regulatory review activities that the President has called for, and in which we are engaged.

In which, aside from reviews that we do all the time for a variety of reasons, we are reexamining all our regulations in response to the very same concerns that you have raised. With respect to concerns that the Congressman had raised in Health and Human Services regulations, we have been looking at our customers, particularly the beneficiaries of our programs, trying to eliminate regulations that are frustrating to consumers, to physicians, to hospitals.

We are doing that within the context of our programs and their specific objectives, focusing on what are the most problematic regulations and the biggest issues that our customers are facing. And I think it is that approach that distinguishes us, or our approach, from that put forth in this legislation. We were criticizing a one-size-fits-all approach that we believe would not address the problems that Americans are facing in regulations, but would simply burden agencies so that they could not respond to their customers' needs.

Mr. GILLILAND. Congressman, could I comment from the standpoint of what I believe the American businessman looks for? And having said this, my last 32 years have been in the private sector, before I entered this heady experience of joining Government. But let me say that I think what the businessmen want, what the regulated industries with which the Department of Agriculture deals want, is a sense of certainty and, to the extent possible, simplicity.

A businessman wants to know what he can do. The laws are complex. We get the laws from Congress. It's up to us to make them work. So the objective of these regulations, the best thing we can do is to understand what the objective is and to try to make it workable in a sense that the businessman can understand and operate in the environment that he operates in.

Mr. FOX. Continue.

Mr. GUTKNECHT. Mr. Gilliland, just real briefly. There was a chart published, I think last year, the Department of Agriculture, that had, I think, 117 layers from the lowest level to the Secretary of Agriculture. Do you know of any private sector that has that many layers?

Mr. GILLILAND. I'm not too familiar with the Department of Agriculture having that many layers, Congressman. I'm not familiar with what you refer to. We have a lot of different agencies and over 100,000 people, but I don't know that we have that many layers.

Mr. GUTKNECHT. Do you know how many layers you do have? I mean, from the Secretary of Agriculture to the lowest person on the rung, how many layers of management are there?

Mr. GILLILAND. I could not comment on that.

Mr. GUTKNECHT. OK. Thank you.

Mr. FOX. Thank you, Congressman Gutknecht. I do want to say at this time—any more questions, Congressman Waxman? Any more questions you have at all?

Mr. WAXMAN. Mr. Chairman, I have no further questions. But let me ask this, if I might. I think the Members may have additional questions to ask.

Mr. FOX. Yes, we developed—adopted your request.

Mr. WAXMAN. That was for opening statements, and you did do that for me. But let's leave the—

Mr. FOX. Leave it for all members of the panel—

Mr. WAXMAN. All Members ought to have an opportunity, if they want to submit some questions in writing to this panel.

Mr. FOX. By tomorrow, so we can have response by the week end.

Mr. WAXMAN. Could we ask the witnesses to respond in writing to questions submitted by members of this committee? And then we ought to have all the questions, if they're to be submitted, by the end of the day tomorrow, and then give this panel a week.

Mr. FOX. Thank you very much, we agree. I just want to take this opportunity to thank Mr. Roberts, Commissioner of SEC; Judy Feder from the Department of Health and Human Services; James Gilliland, General Counsel, Agriculture; Edward Knight from Treasury; Stephen Kaplan from Transportation; and William Kennard from FCC, for their testimony, and for each of you coming today and participating.

Thank you very much. The hearing is adjourned.

[Whereupon, the hearing was adjourned at 3:30 p.m. subject to the call of the Chair.]



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